89-950

No. 89-

In The

Supreme Court of the United States

October Term, 1989

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

JOHN H. BLANKENBAKER; LESLIE B. CALVIN; MOSE A. COVINGTON; ALFRED E. LYONS; LONNIE L. MOORE; VICTOR POWELL; WILLIAM A. SMITH; MARTYN H. TUGGLE; T. F. VAN WINKLE; EARL O. WALKER; GREEN JUNIOR WALLACE; WILLIAM H. ZANDERS; HOMER JACKSON; EUGENE H. BUNCH; GEORGE E. HARVEY, SR., By His Personal Representative; RAY E. LANDRUM; and All Other Persons Similarly Situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Can the intent to discriminate required by § 703(h) of Title VII of the 1964 Civil Rights Act be presumed from proof of a disparate impact of a seniority system on minority employees?

(2) Can a seniority system be held to be non-bona fide if there is no causal connection proved between the seniority system and any statistical disparity in the positions of minority and majority employees?

(3) Is a legitimate business reason for adopting and maintaining a seniority system relevant only insofar as it reflects the existence or lack of discriminatory intent, or is it a complete affirmative defense if the same action would have been taken even in the absence of an impermissible motive?

(4) Does a seniority system automatically have its genesis in racial discrimination if it was created at a time when racial discrimination was the standard operating procedure of the employer?

(5) Is an attack in 1976 on a seniority provision that was adopted one hundred years ago, a timely action?

(6) Is pre-Act discrimination actionable under Title VII of the 1964 Civil Rights Act?

(7) Can damages be sought under Title VII?

(8) Can a plaintiff seek "back pay" against a union under Title VII if the union takes no part in any post-Act discrimination?

QUESTIONS PRESENTED–Continued

(9) Can an employee seek "back pay" against a union if there is no master-servant relationship and no inference of a bargain to pay for services between a union and its members, which would make such back pay restitution instead of damages?

(10) Can plaintiffs seek back pay against a union for a non-bona fide seniority system if the plaintiffs could have been made whole by receiving back pay from the employer, but chose not to do so?

(11) Did the Court of Appeals overstep its authority in making findings of fact?

(12) Does failure to change a seniority system post-Act to provide a remedy for pre-Act or post-Act discriminatory placement make a seniority system non-bona fide?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

The proceedings below were a consolidation of three actions, all against the Atchison, Topeka and Santa Fe Railway Co., a corporation, and the petitioner, the United Transportation Union:

John Blankenbaker, et al. v. The Atchison, Topeka & Santa Fe Railway Co., et al., Case No. 82-1984;

George E. Harvey v. United Transportation Union, Case No. 76-31-C6; and

Ray E. Landrum, an intervenor in the case of *Sears v. Santa Fe Railway Company*, 454 F.Supp. 158 (D. Kan. 1978) in 1973, who was determined not to be a member of the class covered by the *Sears* case, and whose claims were later consolidated with *Blankenbaker*.

There are fourteen other individual plaintiffs in the Blankenbaker action, Case No. 82-1984. They are: Eugene Bunch, James Bunch, Leslie Calvin, Mose Covington, Homer Jackson, Alfred Lyons, Lonnie Moore, Victor Powell, William Smith, Martyn Tuggle, T. F. Van Winkle, Earl Walker, Green Junior Wallace, and William Zanders.

Petitioner United Transportation Union is not a corporation.

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JOHN H. BLANKENBAKER; et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The United Transportation Union, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Tenth Circuit Court of Appeals entered in the above-entitled case on June 16, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 878 F.2d 1235 (10th Cir.

1989), and is reproduced in the Appendix at A-1 to A-39. The District Court decision has not been officially or unofficially reported and is reproduced in the Appendix at A-40 to A-88.

JURISDICTION

The decision of the court of appeals was entered on June 16, 1989. A timely petition for rehearing was denied on September 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.1.

FEDERAL STATUTE INVOLVED

The federal statute involved in this case is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* The text of the pertinent sections of this title is set forth in the Appendix at A-89 to A-98.

STATEMENT OF THE CASE

Respondents were black employees of the Santa Fe Railway Co. They brought this action on November 24, 1982, on their behalf and on behalf of all black male and female Americans employed by Santa Fe as chair car attendants, who had never been employed as train porters, during any period from July 2, 1965, to the present date. Liability was premised upon the contentions of

disparate treatment and disparate impact from the defendants' roles in establishing and maintaining a discriminatory employment policy and a mala-fide seniority system against these black chair car attendant employees in violation of 42 U.S.C. Sec. 2000e-2(a) and -2(c).

In a Memorandum and Order dated September 6, 1984, the district court concluded that the claims by chair car attendants were preserved under the equitable tolling doctrine by the filing of the Complaint in *Sears v. Santa Fe Railway Co.*, 454 F.Supp. 158 (D. Kan. 1978), *affirmed in part, reversed in part, remanded*, 645 F.2d 1365 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982). The *Sears* plaintiffs had originally sought to represent the claims of chair car attendants, but later dropped any such claims as being in conflict with the claims of porter brakemen. The district court also found that the respondents met the requirements of Rule 23(a), F.R.Civ.P., and allowed this matter to proceed as a class action. The certified class consisted of

> the named plaintiffs and all other Negro (black) male and female Americans employed by The Atchison, Topeka and Santa Fe Railway Company, at any time, as chair car attendants, exclusive of the provisional employees during summers and holidays, who were never employed as train porters, during any period from July 2, 1965 to the present date.

In the *Sears* litigation, the working provisions at issue were those that gave separate and different seniority, pay, and promotion rights to white brakemen and black porter-brakemen, even though they both performed, in essence, the same job. The issue was equal pay and seniority for equal work. *Sears v. Santa Fe Railway Co.*, 454 F.Supp. 158 (D.C. Kan. 1978), *affirmed in part, reversed in*

part, remanded, 645 F.2d 1365 (10th Cir. 1981); *see also Sears v. Santa Fe Railway Co. and United Transportation Union,* 779 F.2d 1450, 1456 (10th Cir. 1985). The claim in the instant case was the claim that the seniority system prevented the chair car attendants from taking jobs as brakemen, because to do so, they could not retain their chair car attendant seniority. Prior to the segregated porter brakeman position's being done away with by the *Sears* litigation, the Brotherhood of Sleeping Car Porters (BSCP), the union which represents the chair car attendant craft, had a contract with the Santa Fe which allowed any chair car attendant transferring to the porter-brakeman position to retain his chair car attendant seniority. This contractual provision was not enlarged to include seniority retention upon transfer to any other craft, including regular brakeman, until March 23, 1971. The Brotherhood of Sleeping Car Porters was never a party to the *Blankenbaker* action, and it was never contended that the petitioner herein, the United Transportation Union, ever committed any act to deter such seniority retention from being enacted.

The consolidated action was tried to the district court before the Honorable Wesley E. Brown in January, 1985. Subsequent to trial, plaintiffs settled their claims for back pay and attorneys' fees, but not injunctive seniority relief as to the Santa Fe. Plaintiffs and defendant UTU were unable to reach a settlement. The settlement between plaintiffs and defendant Santa Fe was approved by the district court on January 14, 1986.

Thereafter, the district court issued its "Memorandum Opinion and Order" on June 9, 1986, holding that defendant UTU had not violated Title VII post Act and

was not liable to plaintiffs. The Court found that defendant Santa Fe had discriminated in violation of Title VII as to placement, or "job assignment," and concluded that some class members might be entitled to relief. Since all monetary claims had been settled with the Santa Fe, the only potential relief of the class members against the Santa Fe was possible seniority injunctive relief for those still employed by the Santa Fe. The district court concluded that there was no pattern or practice of discrimination in filling switchman or brakeman jobs "by 1968 and thereafter," recognizing that at any time there might be individual, non-pattern or practice cases. (A-69.) As to the matter of deterrence in transfer to switchman or brakeman, the Court concluded that any deterrence that existed ended in March, 1971, when the Santa Fe and the chair car craft union, the Brotherhood of Sleeping Car Porters, made a seniority retention agreement that allowed a transferring chair car attendant to retain his chair car seniority. At that point, there was no economic risk to transfer to a different craft. (A-68 – A-72.)

In light of the finding on elimination of deterrence to transfer in March, 1971, the district court modified the previously certified class so as to now exclude "those who were employed as chair car attendants on the Santa Fe after March 23, 1971." (A-83, A-87.) The court further found that the challenged seniority system was bona fide under Section 703(h). (A-83.) While the Court accordingly held that the UTU had no Title VII liability, the Court ordered that the UTU remain a party Defendant under Rule 19 for purposes of effectuating potential injunctive seniority relief on claims against the Santa Fe as to individual class members. A judgment was entered on

August 20, 1986, in accord with the June 9, 1986, opinion, and an appeal to the Tenth Circuit Court of Appeals followed on September 16, 1986.

The Tenth Circuit vacated the district court's judgment on June 16, 1989. The court of appeals reversed and remanded the district court's determination "that the seniority system in issue was bona fide" because, the court of appeals held, the district court made "legal errors . . . in its application of the *Stockham Valve* factors and in its failure to consider" what the court of appeals determined to be other "relevant evidence." (A-20.) Petitioner's Petition for Rehearing was denied on September 14, 1989, and the cause was remanded to the district court for further proceedings on September 25, 1989.

REASONS FOR GRANTING THE WRIT
THE DECISION IS CONTRARY TO THE HOLDINGS OF THIS COURT

The decision of the Tenth Circuit Court of Appeals conflicts with the following decisions of the Supreme Court of the United States:

Lorance v. AT&T Technologies, Inc., ___ U.S. ___, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989)

Wards Cove Packing Co. v. Atonio, ___ U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)

Price Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)

Watson v. Fort Worth Bank & Trust, 487 U.S.___, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)

Pullman-Standard v. Swint, 456 U.S. 273 (1982)

International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977)

A. Disparate Impact v. Discriminatory Intent

While the court of appeals states that "a finding of discriminatory intent can be based on indirect, circumstantial evidence including evidence of discriminatory impact," citing the decision of this Court in *Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982) (A-20 – A-21), this Court actually held in *Swint* at 456 U.S. 289 that under §703(h) of Title VII,

> [d]ifferentials among employees that result from a seniority system are not unlawful employment practices unless the product of an intent to discriminate. It would make no sense, therefore, to say that the intent to discriminate required by 703(h) may be presumed from such an impact.

Nothing is mentioned in *Swint* about circumstantial evidence. The court of appeals calls for a shifting of the "intent" test back to an "impact" test. This is contrary not only to *Pullman-Standard v. Swint*, but also to *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 345, 352-354, 356 (1977).

B. Causation in Disparate Impact Cases

The court of appeals' decision is also contrary to this Court's recent decisions in *Watson v. Fort Worth Bank & Trust*, 487 U.S. ___, 108 S.Ct. 2777 (1988); *Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). As a threshold to determining

whether a particular action has any bearing on any proven statistical disparity, these cases require a causal connection between the allegedly discriminatory actions and such disparity. The district court here found plaintiffs failed to prove a causal connection between separate seniority for chair car attendants and brakemen, and blacks not being represented in sufficient numbers in the brakeman's craft until the 1960's or later. (A-78 – A-79.)

As the district court found, subject to the clearly erroneous rule of Fed.R.Civ.Pro. 52(a):

> Whatever undesirable economic effects plaintiffs claim such a craft system might have had in deterring chair car attendants from considering inter-craft transfer or promotion across craft lines to better jobs, the Cross-Craft Agreement relieved those chair car attendants who chose to hire out in new crafts of any anxiety in having had to "commit seniority suicide." By this Agreement of March 23, 1971, virtually all reasonable economic risks that might have discouraged chair car attendants' long-yearning desire to seek better-paid jobs after 1968 was effectively and securely eliminated.

A-70 – A-71.

The district court's opinion is in line with *Watson v. Fort Worth Bank & Trust, supra,* and *Wards Cove Packing v. Atonio, supra.* The Court of Appeals' decision is not.

C. Legitimate Business Justification

The court of appeals also stated that "a defendant's legitimate business reasons for adopting and maintaining a seniority system are relevant only insofar as they reflect

the existence or lack of discriminatory intent." (A-21.) This holding is contrary to the recent decisions of this Court in *Price Waterhouse v. Hopkins*, ___ U.S. ___, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and *Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989). These decisions hold that if a defendant would have made the same decisions or taken the same action based on legitimate non-discriminatory business reasons, and if this would have been the same action even "in the absence of an impermissible motive," then that is a complete affirmative defense, whether in a disparate treatment or in a disparate impact case. *Price Waterhouse*, 109 S.Ct. at 1782; *Wards Cove Packing Co.*, 109 S.Ct. at 2125-26.

The defendants showed in the instant case, the district court so found, and the plaintiffs did not show otherwise, that not only was separate seniority for chair car attendants and the operating crafts based on legitimate business reasons, but that in every place in the world where railroad workers were of the same race, chair car attendants still have separate seniority from brakemen, switchmen, and other operating crafts. (A-79.)

D. Genesis

The court of appeals panel further held that the district court, "contrary to its findings in Sears I," found that "the seniority system did not have its genesis in racial discrimination." (A-27.) The court of appeals finds this to be clearly erroneous because "a seniority system has its genesis in racial discrimination if it is created when discrimination is the 'standard operating procedure' of the

employer." (A-27.) This holding of the court of appeals completely misconstrues *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977), and excludes potentially relevant evidence while purporting to do the opposite.

In *Teamsters v. U.S.*, 431 U.S. 324, 346 n. 28 (1977), this Court found that seniority systems which "had their 'genesis in racial discrimination' " were seniority systems in which "an intent to discriminate entered into [their] very adoption." Whether "segregation was standard operating procedure" with the employer at the time of the adoption of the seniority provisions in question is merely *one* of the conditions that should be looked at. Contrary to the court of appeals' holding, that is not the one determining factor.

The district court's finding that the origin of seniority for brakemen and switchmen as separate from other crafts

> was not motivated by racial animus. . . .[but] was a direct countervailing response to protect its members against favoritism and nepotism in personnel management

is not clearly erroneous. (A-81.) Rather, it represents a correct application of the principle in *Teamsters*, which the court of appeals seeks to rewrite.

Chair car attendant seniority was, and is, separate not only from the brakeman and switchman crafts, which were previously predominantly white, but also from the porter-brakeman craft, which was all black. Race did not matter; the chair car attendant's position had its genesis

as a bona fide craft, separate from all the operating jobs, based on job differences, not on race.

E. Seniority Relief and Back Pay – Pre-Act v. Post-Act Discrimination

In the instant case, as in *Teamsters*, there was no need to find a perpetuation of pre-Act or even pre-charge discrimination for the plaintiffs' cause to be actionable, as no claims against the employer for discriminatory placement were time-barred. As this Court said in *Teamsters*, 431 U.S. at 348, n. 30:

> [T]his is simply an additional reason not to hold the seniority system unlawful, since such a holding would in no way enlarge the relief to be awarded. *Lee Franks v. Bowman*, 424 U.S. at 778-79.

Under *Franks v. Bowman*, 424 U.S. 747 (1976), and *Teamsters*, 431 U.S. at 347, the plaintiffs are eligible for retroactive seniority as a remedy for discriminatory placement, "even if the seniority system agreement itself makes no provision for such relief," and the plaintiffs have received it in this case. (A-83 – A-88.)

Actions against a seniority system begin to run at the time the particular seniority provisions are adopted. *Lorance v. AT&T Technologies, Inc.*, ___ U.S. ___, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989). The seniority provisions under attack here are the separate seniority for chair car attendants and brakemen. That separation of craft seniority was put into effect one hundred years ago, and any action against it now is untimely.

What the court of appeals seems to be sending the case back to the district court for, however, is to assess damages for pre-Act discrimination. (A-2.) This is contrary to the decisions of this Court for two reasons. First, even if pre-Act discrimination were found, it is not actionable under Title VII. *Teamsters v. U.S.*, 431 U.S. at 356. Second, damages are not recoverable under Title VII. *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S.Ct. 2363, 2375 n.4, 105 L.Ed.2d 132 (1989); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416-19 (1974).

F. Failure of a Seniority System to Provide a Remedy

The court of appeals also held that "UTU's failure to execute the 1976 Seniority Modification Agreement also may be evidence of maintenance of the seniority system with an intent to discriminate," and admonished that "[o]n remand the district court should consider this discriminatory use of Santa Fe's seniority system in making its ultimate finding under §703(h)." (A-33 – A-34.) While it is true that the UTU's endorsement was necessary for the Seniority Modification Agreement to be effective as to the brakeman and switchman crafts, there was no evidence that the failure to endorse this Agreement was a "discriminatory use of Santa Fe's seniority system." In so holding, therefore, the court of appeals panel has overstepped its authority in making a finding of fact on its own contrary to Fed. Rule 52(a), *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982).

The Seniority Modification Agreement was instituted by the carrier as a *remedy* to its pre-Act (or pre-1968) discriminatory placement. This remedy was not retroactive seniority back to the effective date of the Act; it was carry-over of pre-Act seniority to other crafts. The United Transportation Union did not have an affirmative duty to execute a new seniority agreement allowing chair car attendants to carry over pre-Act seniority to the brakeman craft, and the failure to execute such an agreement did not render the brakemen's seniority system non-bona fide. This Court specifically said in *Teamsters* that to

> place an affirmative obligation on the parties to the seniority agreement to subordinate those [seniority] rights in favor of the claims of pre-Act discriminatees without seniority. . . .would be a perversion of the congressional purpose,

and that

> Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees.

431 U.S. at 353-354.

And in *Ford Motor Co. v. EEOC*, 458 U.S. 219, 239 (1982), this Court held that Title VII considers the rights of "innocent third parties," and that a defendant should not be required to cap backpay liability "only by forcing . . . incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination." *See also, Firefighters Loc. 1784 v. Stotts*, 467 U.S. 561 (1984).

That is not to say that the plaintiffs should not have gotten retroactive seniority back to the date of the Act. As the Supreme Court stated in *Teamsters:*

> Post-Act discriminatees . . . may obtain full "make whole" relief, including retroactive seniority under *Franks v. Bowman,* supra, without attacking the legality of the seniority system as applied to them. *Franks* made clear and the union acknowledges that retroactive seniority may be awarded as relief from an employer's discriminatory hiring and assignment policies even if the seniority system agreement itself makes no provision for such relief. 424 U.S. at 778-779.

Teamsters v. U.S., 431 U.S. 324, 347 (1977).

While the chair car attendants' union's 1971 Cross-Craft Agreement and the brakemen's and switchmen's seniority agreements make no provisions for retroactive seniority, that relief was still available to the plaintiffs from the court as an equitable *remedy,* and the district court so awarded it. (A-83 – A-86.) However, failure to provide a remedy through the seniority system for discriminatory segregated placement does not make a seniority system non-bona fide. *Teamsters,* 431 U.S. at 347.

CONCLUSION

The Tenth Circuit decision conflicts with decisions of the United States Supreme Court, and consideration by this Court is necessary to secure and maintain the decisions of this Court. If the Supreme Court does not grant this petition and reverse the Tenth Circuit, the Circuit

Court's erroneous legal holdings will become the law of the case on remand to the district court.

Respectfully submitted,

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Ray E. Landrum,
Plaintiff-Intervenor-Appellant,

v.

UNITED TRANSPORTATION UNION; Atchison, Topeka & Santa Fe Railway Company, Defendants-Appellees.

No. 86-2445.

United States Court of Appeals,
Tenth Circuit.

June 16, 1989.

Rehearing Denied Sept. 14, 1989.

Class of blacks employed as chair car attendants on railroad filed race discrimination suit against railroad and union. The United States District Court for the District of Kansas, Wesley E. Brown, J., found discrimination. On appeal, the Court of Appeals, Logan, Circuit Judge, held that: (1) plaintiffs waived issue preclusion claim by failing to timely raise it, and (2) district court made legal errors in its application of *Stockhalm Valves* factors and in its failure to consider relevant evidence.

Vacated and remanded.

Gerrit H. Wormhoudt (John T. Conlee, Thomas D. Kitch, Gregory J. Stucky and Link Christin, of Fleeson, Gooing, Coulson & Kitch, Terry G. Paup, and Chester I.

Lewis, of Lewis & Davis, on the briefs), Wichita, Kan., for plaintiffs-appellants.

Norton N. Newborn, Cleveland, Ohio (E.L. Lee Kinch, Wichita, Kan., Pamela D. Walker, Little Rock, Ark., and Shelly J. Venick and Barbara J. Barr, The Atchison, Topeka & Santa Fe Ry. Co., Chicago, Ill., with him, in the brief), for defendants-appellees.

Before LOGAN and MOORE, Circuit Judges, and BURCIAGA, District Judge.*

LOGAN, Circuit Judge.

This appeal requires us to reexamine the bona fides of a seniority system previously addressed in *Sears v. Atchison, T. & S.F. Ry.*, 454 F.Supp. 158 (D.Kan.1978) (*Sears I*), *aff'd in part and rev'd in part*, 645 F.2d 1365 (10th Cir.1981) (*Sears II*), *cert. denied*, 456 U.S. 964, 102 S.Ct. 2045, 72 L.Ed.2d 490 (1982). In *Sears II*, we held that the Atchison, Topeka & Santa Fe Railway Company's (Santa Fe) seniority system violated Title VII of the Civil Rights Act of 1964 (Title VII or the Act), §§ 701-718, 42 U.S.C. § 2000e to 2000e-17, because it perpetuated the effects of pre-Act discrimination and was adopted and maintained with an intent to discriminate. We also held that the United Transportation Union's (UTU) role in creating and maintaining the discriminatory system subjected it to liability under Title VII. The class receiving relief in *Sears* was composed of black males who at any time were employed by Santa Fe as train porters, also known as porter-brakemen, and who were employed by Santa Fe in

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* The Honorable Juan G. Burciaga, United States District Judge for the District of New Mexico, sitting by designation.

any capacity after July 2, 1965, the effective date of Title VII.[1] *Id.* at 1368, 1370; *Sears I*, 454 F.Supp. at 160.

The class in the instant case initially was composed of black persons employed as chair car attendants any time after the effective date of Title VII and who never were train porters. *Blankenbaker v. United Transp. Union*, Nos. 82-1984 and 76-31-C6, slip op. at 2, 3 (D.Kan. June 9, 1986).[2] The class subsequently was modified to exclude blacks employed as chair car attendants on the Santa Fe after March 23, 1971. *Id.* at 55. The case was tried based on the stipulated facts in *Sears*, as well as documentary and testimonial evidence before the court. *Id.* at 4. After

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[1] The *Sears* class was divided into two subclasses as follows: (1) plaintiffs who had train porter seniority prior to April 20, 1942, and who still were employed as train porters on the effective date of Title VII; and (2) plaintiffs who had train porter seniority after April 20, 1942, were reclassified as chair car attendants as a result of Award 19324, discussed *post* at pp. 1240-41, and who still were employed as chair car attendants on the effective date of Title VII. *Sears II*, 645 F.2d at 1370.

[2] The original *Blankenbaker* class was part of the *Sears* litigation, but was severed from that action on October 29, 1974. *Blankenbaker*, slip op. at 5. Thereafter, two other cases were consolidated with *Blankenbaker* to complete this class action. One was brought by plaintiff George H. Harvey on behalf of himself and a class of chair car attendants. Harvey had settled his claim against Santa Fe in 1973, and his remaining claims against UTU were consolidated with the *Blankenbaker* action. *Id.* at 5-6. The second action involved claims by plaintiff Ray E. Landrum, who intervened in *Sears*. Landrum later was excluded from the *Sears* class and settled his claims against Santa Fe in 1976. *Id.* at 6. His claims against UTU were consolidated in this action. *Id.*

trial but before judgment, Santa Fe settled the plaintiffs' claims for back pay and attorneys' fees. Thus, all that remained for the court were the plaintiff's claims for back pay against UTU, and for injunctive relief in the from of retroactive seniority against UTU and Santa Fe.

The district court held that Santa Fe discriminated against members of the class "in job assignment on the basis of race" after the effective date of Title VII until March 23, 1971. *Id.* at 55. The court then formulated standards under which individual plaintiffs could receive retroactive seniority. The parties do not appeal this ruling. The district court also held that the "craft seniority system for the craft of brakeman-switchman, as it was applied to the chair car attendant craft, was bona fide, and that defendant UTU is immunized from liability for assessment of back pay" by § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). *Id.* Plaintiffs appeal this holding.[3]

I

Factual Background

UTU is an unincorporated labor organization formed by the merger of four labor unions on January 1, 1969. Since at least 1892, either the UTU or two of its predecessors, the Brotherhood of Railroad Trainmen (BRT) and

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[3] Plaintiffs also specifically challenge the district court's finding that UTU's agreement to the Seniority Modification Agreement, discussed *post* at p. 1241, was unnecessary for the Agreement to be fully implemented. We conclude that this finding was clearly erroneous, *see post* at p. 1250, but do not decide, whether UTU's failure to sign the agreement has any significance independent of the seniority system issue.

the Order of Railway Conductors and Brakemen (ORC & B), have served as collective bargaining agents for brakemen, switchmen, and conductors on the Santa Fe. The Brotherhood of Sleeping Car Porters (BSCP) is an unincorporated labor organization certified in 1946 to represent train porters and chair car attendants on the Santa Fe. The BSCP, not a party to this litigation, merged in 1978 with a division of the Brotherhood of Railway, Airline and Steamship Clerks (BRAC).

During the time relevant to this appeal, the Santa Fe rail lines were divided into three "Grand Divisions" known as the Eastern, Western, and Coast Lines. The Eastern Lines operated in Illinois, Iowa, Missouri, Kansas, Oklahoma, Colorado, and New Mexico. The Western Lines operated in Kansas, Oklahoma, Texas, Louisiana, and New Mexico. The Coast Lines operated in New Mexico, Arizona, and California. Each line was subdivided into divisions. Until Santa Fe's rail passenger service was taken over by Amtrak in May 1974, Santa Fe operated both passenger and freight trains on its lines.

The operating crew on a Santa Fe passenger train generally consisted of the conductor, train porter or head-end brakeman, rear-end brakeman, fireman, and engineer. The duties of brakemen, also known as road brakemen, included "the inspection of train cars, and testing the use of hand and light signals for the movement of trains, opening and closing of switches, coupling and uncoupling cars, hose and chain attachments, [and] reporting to and receiving instructions from the trainmaster and the conductor." *Blankenbaker*, ship op. at 10. Switchmen, also known as yard brakemen, performed

essentially the same duties, as road, brakemen on passenger or freight trains, but worked regular hours and only within the yard. Train porters, a position created by Santa Fe in 1899, performed head-end braking duties on passenger trains in addition to servicing passengers and maintaining the interior of the cars. Chair car attendants, part of the nonoperating crew, were service personnel who attended to passengers' needs and cleaned the interior of the cars.

A new hire began to accumulate craft seniority within a seniority district on the earliest date of continuous service on the Santa Fe in that particular craft within that particular district. An employee's seniority date is critical because it "determines promotional opportunities as well as his right to protect work within his craft and district." *Sears II*, 645 F.2d at 1369. The first known agreement creating seniority rights on the Santa Fe was in 1892 between Santa Fe and predecessors of the UTU. Until the formation of the UTU in 1969, the BRT represented brakemen and switchmen, and the ORC & B or a predecessor represented conductors on the Santa Fe. From at least 1938 to 1960, only whites could join the BRT. *Blankenbaker*, slip op. at 13-14. The ORC & B also limited its membership to whites from at least 1934 to 1966. *Id.* at 14.

During the time period covered by this suit, the entry level position for whites on the Santa Fe was either as a brakeman or switchman. With few exceptions,[4] until the

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[4] For example, Donald Tousant, a black, was hired as a brakeman/switchman on the Coast Lines in 1962. *Blankenbaker*,

(Continued on following page)

mid- or late-1960s all brakemen and switchmen on the Santa Fe were white. Before dualization of the brakemen's and switchmen's rosters, *see post* at pp. 1240-41, a new hire began working off the "extra-board" for the craft in which he was hired.[5] After accumulating sufficient seniority, a brakeman, for example, could "bid" for a regular run on a freight or passenger train.[6] After

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(Continued from previous page)

slip op. at 27, 32. Jerry Brown, a black, was hired as a switchman in the Chicago Terminal in 1965. *Id.* at 32. The first black hired as a brakeman on the Eastern Lines was in 1968. *Id.* at 31. The first black brakeman on the Colorado Division was hired in 1971. IV R. 470; V R. 700. The major exception to the all-white, pre-Act composition of the brakemen/switchmen work force was in the Silsbee, Texas, Seniority District. According to the trail court in *Sears I*, this district "has been something of an anomaly in the history of the Santa Fe, for black rather than white males have been predominantly employed as brakemen in that district." 454 F.Supp. at 166 n.9.

[5] In *Sears I*, the district court explained how the extra-board system worked as follows:

> "Working off the extra board generally meant that the employee was available for call to temporarily take the place of an employee who did hold a regular job, but who was absent for reason of illness, vacation or otherwise. The employee called off the extra board would be protecting the job or work for which he was called."

454 F.Supp. at 166 n.8.

[6] According to the district court in *Sears I*, "[w]hen vacancies occurred in regularly held or full-time jobs, the jobs would be 'advertised' for bid by Santa Fe, usually through a bulletin, and the employee with the most seniority who bid pursuant to the advertisement got the job." 454 F.Supp. at 166.

meeting certain requirements, including years of freight service and/or mileage, brakemen were promoted to conductor, but continued to accumulate brakeman seniority as well as seniority on the separate conductors' roster. *Sears II*, 645 F.2d at 1376; *Sears I*, 454 F.Supp. at 166, 179; VI R. 923-26; VII R. 1117, 1120; VIII R. 1242-43; VIII R. 1253-54; IX R. 1432-33. Similarly, the line of progression in the yard was from switchman to engine foreman, also known as yard conductor. *E.g.*, VII R. 1117, 1120. We assume that a newly promoted engine foreman continued to accumulate seniority on the switchmen's roster.

Traditionally, the entry level position for blacks on the Santa Fe was an a chair car attendant, although some blacks were hired directly as train porters. Until 1959, chair car attendants on the Santa Fe could be promoted to train porters after meeting certain requirements. A newly promoted train porter could continue to work and accumulate seniority as a chair car attendant and bid on the train porter's extra-board until he had sufficient train porter seniority to obtain a regular position. All train porters were black and members of the chair car attendant craft were exclusively black until the 1960s when Santa Fe began hiring whites, usually college students, as temporary help during holidays and the summers. *See, e.g.*, III R. 66-67, 119; (white chair car attendants first hired in 1967 or 1968); III R. 153-54 (first hired in 1968 or 1969); VI R. 848-50 (first hired in 1959 or 1960).

Santa Fe's creation of the train porter craft[7] to perform head-end braking duties in addition to a service function led to numerous clashes with the brakemen's

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[7] The defendant's expert witness testified that the train porter craft was unique to the United States. IX R. 1459-60.

collective bargaining representative, the BRT. The use of train porters to perform braking duties was beneficial to Santa Fe because train porters were paid less than their white counterparts, *Sears II*, 645 F.2d at 1369; *Blankenbaker*, slip op. at 12, and performed passenger service functions that "would be distasteful" to the white brakemen, *Sears I*, 454 F.Supp. at 168. After World War I,[8] the BRT made several efforts to obtain for its own members braking work performed by black train porters.[9] These

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[8] During the war, the federal government took over administration of the nation's railroads. The Director General of Railroads issued General Order 27, which provided that "[e]ffective June 1, 1918, colored men employed as firemen, trainmen and switchmen shall be paid the same rate of wages as are paid white men in the same category." *Sears I*, 454 F.Supp. at 163 n. 4. Subsequent interpretations of this order made it clear that it was intended to equalize wages paid to black train porters who performed the same duties as white brakemen. *See Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 771, 72 S.Ct. 1022, 1024, 96 L.Ed. 1283 (1952); Plaintiffs' Trial Exh. V, *contained in* Addendum to Brief of Appellant, vol. I, tab A-8 at 19, 46.

[9] According to the district court, "[t]he animosity directed toward black train porters by BRT was well-documented in the annals of judicial opinions." *Blankenbaker*, slip op. at 14; *see, e.g., Howard v. Thompson*, 72 F.Supp. 695, 698-99 (E.D.Mo.1947), *aff'd in part and rev'd in part sub nom., Howard v. St. Louis-S.F. Ry.*, 191 F.2d 442 (8th Cir.1951), *aff'd sub nom. Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952); *Randolph v. Missouri-K.-T. R.R.*, 68 F.Supp. 1007 (W.D.Mo.1946), 7 F.R.D. 54 (W.D.Mo.1947), *rev'd and remanded*, 164 F.2d 4 (8th Cir.1947), *cert. denied*, 334 U.S. 818, 68 S.Ct. 1082, 92 L.Ed. 1748 (1948), *on remand*, 78 F.Supp. 727 (W.D.Mo. 1948), 85 F.Supp. 846 (W.D.Mo. 1949), *aff'd* 182 F.2d 996 (8th Cir.1950), 209 F.2d 634 (8th Cir.1954) (affirming trial court on merits).

efforts included "letter requests, demands legislative lobbying, proceedings before the Train Service Board of Adjustment, the National Railroad Adjustment Board, First Division" (Board), and were the subject of federal court actions. *Sears I*, 454 F.Supp. at 167, *cited in Blankenbaker*, slip op. at 14. In 1939, the BRT filed a protest with the Board concerning Santa Fe's use of train porters to perform head-end braking duties. The Board upheld the protest in Award 6640 and ruled that these braking duties "should be performed by brakemen holding seniority as such on the Santa Fe brakemen's seniority roster." *Id.* at 168. Award 6640 was challenged in federal court based on lack of notice to the train porters of the proceedings.[10] Ultimately, the case was remanded to the Board. In Award 19324, issued on October 14, 1959, the Board ruled that train porters with seniority dates prior to April 20, 1942, the date of Award 6640, could continue to perform braking duties on the Santa Fe. Those train porters with seniority dates after April 20, 1942, were demoted to the position of chair car attendant. None of the plaintiffs in the instant case ever served as train porters on the Santa Fe.

The district court found that although the brakemen and switchmen "craft functions and duties were the same," there was a historical demarcation between road (brakemen) and yard (switchmen) work evidenced by these crafts' separate seniority rosters. *Blankenbaker*, slip

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[10] *See Hunter v. Atchison, T. & S.F. Ry.*, 78 F.Supp. 984, 988 (N.D.Ill.) (order granting temporary injunction), *aff'd*, 171 F.2d 594 (7th Cir.1948), *cert. denied*, 337 U.S. 916, 69 S.Ct. 1157, 93 L.Ed. 1726 (1949), 188 F.2d 294, 302 (7th Cir.1951) (reversing and remanding order for permanent injunction).

op. at 15. As the level of yard work began to decrease, switchmen sought to obtain rights as brakemen, Beginning in 1959 and continuing through the early 1970s, the separate seniority rosters for brakemen and switchmen were dualized on sections of the Santa Fe. *Id.* at 16. Dualization involved placing the yard roster under the road roster and vice versa (called "topping and bottoming"), so that the most senior brakeman would be placed on the switchmen's roster under the most junior switchman, but the brakeman would retain his seniority on the brakemen's roster. *Id.* at 15-16. Likewise, the most senior switchman would become the most junior brakeman. *Id.* Some dualizations were one-way; the switchmen's roster would be placed under the brakemen, but the brakemen would have no corresponding rights to switchmen seniority. *See* IV R. 889. Although the railroad industry is almost completely dualized, there still are some brakemen's and switchmen's rosters on the Santa Fe that remain distinct. VI R. 893.

On February 7, 1965, Santa Fe and other carriers reached an agreement, commonly referred to as the "Feb. 7" agreement or protection, with five unions, not including the BSCP, BRT, or ORC & B. The BSCP and Santa Fe agreed in 1966 to extend Feb. 7 protection to chair car attendants. In general, this agreement guaranteed qualified chair car attendants a certain level of income if the employee was furloughed or worked in a job that paid less than the guaranteed amount. Feb. 7 protection, along with accumulated chair car seniority, would be forfeited if the chair car attendant voluntarily became a brakeman or switchman and assumed his place at the bottom of the appropriate seniority roster. *See, e.g., Sears I,* 454 F.Supp.

at 169-70; V R. 746; Plaintiffs' Trial Exh. BH, *contained in* Addendum to Brief of Appellant, vol. II, tab A-20.

As employment opportunities for blacks on the Santa Fe expanded in the late 1960s, the BSCP sought to obtain an agreement with Santa Fe whereby its members could transfer into better paying jobs with promotional opportunities without losing their Feb. 7 protection or accumulated chair car seniority. On March 23, 1971, the BSCP and Santa Fe executed a "Cross-Craft" agreement, which, somewhat like the brakemen/switchmen dualizations, permitted chair car attendants to transfer to other crafts, including braking and switching, without losing their Feb. 7 protection or accumulated seniority. Thus, while a transferring chair car attendant could not carry over or "dove-tail" his chair car seniority into the new craft and would start as a new hire on that craft's seniority roster regardless of his years as a chair car attendant, he could continue to work as a chair car attendant, or receive Feb. 7 payments until he had sufficient seniority to obtain regular work in his new craft.

In 1976, in an effort to eliminate the lingering effects of past discrimination, Santa Fe, along with other carriers, signed a Seniority Modification Agreement entered into by the National Carriers' Conference Committee and various unions.[11] *Blankenbaker*, slip op. at 23; V R. 729-30;

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[11] The district court's opinion, *see Blankenbaker*, slip op. at 23, can be read to infer that the only union signatory to the agreement was the Brotherhood of Railroad Signalmen. *But see* VIII R. 1164-65 (union signatories included the Brotherhood of Railroad Signalmen, Railroad Yardmasters of America, the Brotherhood of Maintenance of Way Employees, and BRAC).

VIII R. 1162-65. This agreement allowed certain female and minority employees who transferred into crafts represented by signatory unions to carry over previously accumulated seniority into their new craft and retain their seniority in the old craft. *Blankenbaker*, slip op. at 23-24. UTU was not a signatory union. Thus, chair car attendants who transferred to the brakemen's or switchmen's rosters could not carry over previously accumulated seniority.

II

Seniority System

Section 703(a), (c) of Title VII, 42 U.S.C. § 2000e-2(a), (c), provides in relevant part:

> "(a) It shall be an unlawful employment practice for an employer –
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> > (1) to fail or refuse to hire . . . any individual, or otherwise to discriminate against any otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . .
>
> . . . .
>
> (c) It shall be an unlawful employment practice for a labor organization –

> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race . . . ;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual or employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race . . . ; or
>
> (3) to cause or attempt to cause an employer to cause an employer to discriminate against an individual in violation of this section."

This section prohibits practices or procedures, even if neutral, that "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). Thus, practices or procedures "that are fair in form, but discriminatory in operation," *id.* at 431, 91 S.Ct. at 853, violate Title VII even in the absence of an intent to discriminate, because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432, 91 S.Ct. at 854 (emphasis in original).

Seniority systems that operate to "lock in" the effects of pre-Act discrimination would seem to fall under the *Griggs* "disparate impact" rationale were it not for § 703(h) and its subsequent interpretation by the Supreme Court. That section provides that

> "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race."

42 U.S.C. § 2000e-2(h). The Supreme Court has held that because of this section "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 353-54, 97 S.Ct. 1843, 1864, 52 L.Ed.2d 396 (1977).[12] Thus, "the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 102 S.Ct. 1534, 1535, 71 L.Ed.2d 748 (1982); *see also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82, 97 S.Ct. 2264, 2275-76, 53 L.Ed.2d 113 (1977) ("absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences").

Although the Supreme Court has not provided specific guidelines by which lower courts should guidelines

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[12] Later cases have found that § 703(h) immunizes bona fide seniority systems that perpetuate *post*-Act discrimination, *see United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), *explained in Teamsters*, 431 U.S. at 348 n. 30, 97 S.Ct. at 1861 n. 30, and "makes no distinction between seniority systems adopted before its effective date and those adopted after its effective date," *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76, 102 S.Ct. 1534, 1541, 71 L.Ed.2d 748 (1982).

by which lower courts should evaluate seniority systems, the Fifth Circuit has distilled the following four factors from the *Teamsters* case:

> "(1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
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> (2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
>
> (3) whether the seniority system had its genesis in racial discrimination; and
>
> (4) whether the system was negotiated and has been maintained free from any illegal purpose."

James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978); *see Teamsters*, 431 U.S. at 355-56, 97 S.Ct. at 1864-65. We previously have approved use of the *Stockham Valves* factors to guide the district court's inquiry under § 703(h). *See Firefighters Inc. for Racial Equality v. Bach*, 731 F.2d 664, 668 (10th Cir. 1984); *Sears II*, 645 F.2d at 1372 & n.5. The district court here applied the *Stockham Valves* factors to the facts and concluded that "the creation and maintenance of a separate seniority system for the chair car attendant craft was based on legitimate business reasons." *Blankenbaker*, slip op. at 38.

Plaintiffs attack this holding on two separate grounds. First, they claim that principles of collateral estoppel preclude the trial court from holding bona fide here the seniority system found illegal in *Sears*. Second, plaintiffs argue that the trial court applied erroneous

legal standards in examining the seniority system. We will address these contentions in turn.

Collateral estoppel, or issue preclusion, is a judge-made rule that prevents relitigation of issues "actually and necessarily determined" in a prior suit on a different claim, which involved a party to the subsequent litigation. *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979); *see also Lombard v. Axtens (In re Lombard)*, 739 F.2d 499, 502 (10th Cir.1984); *Restatement (Second) of Judgments*, §§ 27, 29 (1982). Here, plaintiffs assert that defendants are precluded by our decision in *Sears II* from contending that the seniority system is bona fide. We hold that plaintiffs waived this issue preclusion claim by failing to invoke it timely.

The issue preclusion claim never was raised formally until May 15, 1986, in Plaintiffs' Supplemental Memorandum in Support of Their Proposed Findings of Fact and Conclusions of Law, I R. tab 268, at 2-3. This memorandum was filed with the court approximately one year and four months after the trial and less than one month before the district court issued its opinion. This simply is too late. Although the use of issue preclusion by plaintiffs[13] is not subject to Fed.R.Civ.P. 8(c),[14] the rationale for

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[13] This commonly is referred to as offensive collateral estoppel – "a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 650, 58 L.Ed.2d 552 (1979).

[14] Rule 8(c) provides that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel, . . . res judicata, . . . and any other matter constituting an avoidance or affirmative defense."

requiring a party to plead defensive issue preclusion pretrial applies to offensive use as well[15] – to provide "the opposing party notice of the plea of estoppel and a chance to argue, it he can, why the imposition of an estoppel would be inappropriate." *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found*, 402 U.S. 313, 350, 91 S.Ct. 1434, 1453, 28 L.Ed.2d 788 (1971) (defendant asserted issue preclusion); *see Southern Pac. Communications Co. v. American Tel. & Tel. Co.*, 740 F.2d 1011, 1018 (D.C.Cir.1984) (plaintiff asserted issue preclusion). Although this notice requirement was established in a case approving defensive use of issue preclusion, it has even more force for offensive use, when, as here, plaintiffs seek to benefit from litigation to which they were not parties. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31, 99 S.Ct. 645, 650-52, 58 L.Ed.2d 552 (1979); *Jack Faucett Assocs., Inc. v. American Tel. & Tel. Co.*, 744 F.2d 118, 124-25 (D.C.Cir. 1984), *cert. denied*, 469 U.S. 1196, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985). Moreover, allowing issue preclusion claims to be raised post-trial does nothing to vindicate two primary policies behind the doctrine, conserving judicial resources and protecting parties from "the expense and vexation" of relitigating issues that

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[15] The rule that issue preclusion must be raised pretrial obviously would give way when, for instance, cases are tried simultaneously or nearly so. *See Harbeson v. Parke Davis, Inc.*, 746 F.Ed 517, 520 (9th Cir. 1984) (defendant asserted issue preclusion). Plaintiffs can make no such argument here. The district court entered its decision in *Sears I* on June 14, 1978, we affirmed that decision in *Sears II* on March 11, 1981, and the Supreme Court denied certiorari on May 3, 1982.

another party previously has litigated and lost. *Montana*, 440 U.S. at 153-54, 99 S.Ct. at 973-74; *see also Parklane Hosiery*, 439 U.S. at 326, 99 S.Ct. at 649.

Plaintiffs direct our attention to the pretrial conference order where they contend the issue of collateral estoppel was raised. II R. tab 105. Careful review of this document, which does not specifically mention issue preclusion or collateral estoppel, and the entire trial record establishes that the plaintiffs intended to rely on our finding in *Sears II*, not for its preclusive effect, but as precedential authority and as a reference point for the present case. In addition, because the basic function of issue preclusion is to "take[] the place of evidence" at trial, R. Casad, *Res Judicata* 267 (1976), plaintiffs' trial conduct reveals a willingness to try the bona fides of Santa Fe's seniority system and a lack of reliance on the preclusive force of *Sears II*.

On the merits, plaintiffs contend that the district court based its § 703(h) determination on erroneous legal standards. Specifically, plaintiffs complain that the court misapplied the *Stockham Valves* factors to its factual findings. Whether a seniority system reflects an illegal intent to discriminate is a "pure question of fact" that we review under the clearly erroneous standard of Fed.R.Civ.P. 52(a). *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed2d 518 (1985) (factfinding clearly erroneous when reviewing court, based on entire record, has "definite and firm conviction that a mistake has been committed") (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)).

Whether the district court failed to consider or accord proper weight or significance to relevant evidence are questions of law we review de novo. *See Swint*, 456 U.S. at 291, 292, 102 S.Ct. at 1791, 1792; *United States v. Georgia Power Co. (Georgia Power II)*, 695 F.2d 890, 892 (5th Cir. Unit B 1983). Even when we discern such errors of law, however, "a remand is the proper course unless the records permits only one resolution of the factual issue." *Swint*, 456 U.S. at 292, 102 S.Ct. at 1792.

We reverse and remand the district court's determination that the seniority system in issue was bona fide because we conclude the court made legal errors both in its application of the *Stockham Valves* factors and in its failure to consider relevant evidence. The key element of a bona fide seniority system under § 703(h) is its lack of purposeful discrimination. *See Gantlin v. West Va. Pulp & Paper Co.*, 734 F.2d 980, 990 (4th Cir.1984); *Terrell v. United States Pipe & Foundry*, 644 F.2d 1112, 1118 (5th Cir. Unit B 1981), *vacated sub nom. on other grounds International Ass'n of Machinists & Aerospace Workers v. Terrell*, 456 U.S. 955, 102 S.Ct. 2028, 72 L.Ed.2d 479 U.S. 955, 102 S.Ct. 2028, 72 L.Ed.2d 479 (1982); *United States v. Georgia Power Co. (Georgia Power I)*, 634 F.2d 929, 934 (5th Cir. Unit B 1981), *vacated sub nom. Local 84, Int'l Bhd. of Elec. Workers v. United States*, 456 U.S. 952, 102 S.Ct. 2026, 72 L.Ed.2d 477 (1982), *on remand, Georgia Power II*, 695 F.2d 890 (affirming prior decision). In deciding whether purposeful discrimination exists, a court must examine the totality of circumstances surrounding the creation and operation of the seniority system. *See, e.g., Teamsters*, 431 U.S. at 345, 97 S.Ct. at 1859-60; *Gantlin*, 734 F.2d at 992. In particular, a finding of discriminatory intent can be based on indirect,

circumstantial evidence including evidence of discriminatory impact, *Swint*, 456 U.S. at 289, 102 S.Ct. at 1790, and pre-Act discrimination, *Evans*, 431 U.S. at 558, 97 S.Ct. at 1889; *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1267 (10th Cir.1988).

The district court concluded that the craft seniority system as applied to chair car attendants was bona fide because it "was based on legitimate business reasons," *Blankenbaker*, slip op. at 38, 51. The court's focus on legitimate business reasons pervades its analysis of each *Stockham Valves* factor. *See, e.g., id.* at 47. But a defendant's legitimate business reasons for adopting and maintaining a seniority system are relevant only insofar as they reflect the existence or lack of discriminatory intent. That rational business reasons could be forwarded to explain the adoption or operation of the system does not eliminate the possibility of purposeful discrimination. That the district court may have assumed to the contrary is one factor in our decision to remand of the case for further consideration.

Moreover, to the extent that the district court did focus on the presence or lack of discriminatory intent, it applied some incorrect legal standards and appears to have disregarded relevant evidence. In applying the first *Stockham Valves* factor,[16] the district court found that the

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[16] The district court stated the first factor as follows: "Does the seniority system apply equally to all races, discouraging transfers of all employees, whites as well as blacks, between *crafts?" Blankenbaker*, slip op. at 41 (emphasis added). The *Stockham Valves* court stated the factor as "whether the

(Continued on following page)

"Santa Fe seniority system for brakemen-switchmen was equally applicable to all applicants regardless of race." *Id.* at 45. This finding appears to focus on facial neutrality. As we noted in *Sears II*, 645 F.2d at 1372-73, however, the *Teamsters* Court took this line of inquiry beyond facial neutrality by examining the seniority system's impact in practice. *See* 431 U.S. at 355-56, 97 S.Ct. at 1864-65. In *Teamsters*, blacks and Hispanics were hired only as city drivers or servicemen. The generally superior or "target" jobs were as line drivers. The Court found that "[t]he city drivers and servicemen who are discouraged from transferring to line-driver jobs are not all Negroes or Spanish-surnamed Americans; to the contrary, the overwhelming majority are white." *Id.* at 356, 97 S.Ct. at 1865. Thus, the Supreme Court examined the seniority system's effect on employees seeking transfers from the job classifications into which discriminatees were placed to the "target" jobs. Here, the craft into which discriminatees were placed was that of chair car attendant. The "target" job was that of brakeman/switchman. Unlike the situation in *Teamsters*, all chair car attendants discouraged from transferring to the more desirable jobs of brakemen/switchmen were black.

(Continued from previous page)

seniority system operates to discourage all employees equally from transferring between *seniority units.*" 559 F.2d at 352, *quoted in Sears II*, 645 F.2d at 1372 n. 5 (emphasis added). Plaintiffs allege that the district court's substitution of "crafts" for "seniority units" was legal error. We do not agree. In this case, "crafts" and "seniority units" are synonymous.

Apparently addressing this fact, the district court noted that *Sears II* involved a stipulation that the brakemen's and switchmen's rosters were dualized in 1960. Considering evidence presented at trial here, the district court found that this stipulation was factually incorrect. It then found because the brakemen's and switchmen's rosters were not completely dualized before 1971, "the Santa Fe seniority forfeiture rules on entry-level jobs have always worked to discourage not only black employees, but also white brakemen or switchmen from moving to another craft." *Blankenbaker,* slip op. at 43-44.

Although we do not question the district court's finding on this point and note that it is proper to examine the transfer policies of jobs other than those into which discriminatees were placed, this alone is not sufficient to support a finding of neutrality in operation. The inquiry must move beyond facial neutrality into disparate impact – does the system affect whites and blacks *equally? See Swint,* 456 U.S. at 289, 102 S.Ct. at 1790; *Teamsters,* 431 U.S. at 356, 97 S.Ct. at 1865 (seniority system bona fide in part because it applied "equally to all races"). An examination of the system's disparate impact is necessary because a facially neutral system simply may be a "mask for the gross inequality beneath." *Georgia Power I,* 634 F.2d at 935.

For instance, the district court did not comment upon, and thus appears not to have considered, the differences in pay and promotional opportunities available to the two groups. Switchmen essentially are brakemen in the yard, *e.g., Blankenbaker,* slip op. at 10, 15, are paid more than chair car attendants, *e.g.,* III R. 249; IV R. 322, 357; VIII R. 1293, and are in a line of progression to

engine foreman, *e.g.*, VII R. 1117, 1120. Chair car attendants do not perform any braking duties, *Blankenbaker*, slip op. at 10, 50, are paid less than brakemen and switchmen, and after 1959 had no hope of promotion, *Sears II*, 645 F.2d at 1376; *Blankenbaker*, slip op. at 11, 14. Equating the seniority system's effect on chair car attendants with its effect on switchmen, who occupy a job that is as much a "target" job for attendants as road brakemen, is like finding that the system is neutral in operation because conductors would be deterred by loss of their conductor seniority from transferring to the chair car craft. That whites in other job classifications also are deterred from transferring may be evidence of the system's facial neutrality, but the all black composition of the most deterred craft – chair car attendant – is countervailing evidence of discrimination that the district court must consider.

On remand, the district court should consider the chair car attendant craft's racial composition and evidence of the seniority system's disparate impact. *See Gantlin*, 734 F.2d at 990-91 & n. 17 ("under some circumstances it is permissible to infer that a racially discriminatory motive exists if a seniority system's predominant effect is to confine blacks to lower-paying, menial jobs") (citing *Georgia Power I*); *Terrell*, 644 F.2d at 1119 (reversal of finding of bona fideness in part because district court erred in not considering seniority system's disparate impact); *Georgia Power I*, 634 F.2d at 935 (same). Although evidence of disparate impact alone is not sufficient to invalidate a seniority system under § 703(h), *Swint*, 456 U.S. at 277, 102 S.Ct. at 1784; *Patterson*, 456 U.S. at 65, 102 S.Ct. at 1535-36, it may be highly probative evidence of a defendant's purposeful discrimination. *See*,

e.g., Swint, 456 U.S. at 289, 102 S.Ct. at 1790; *Teamsters*, 431 U.S. at 356, 97 S.Ct. at 1865 (Court considered racial composition of disadvantaged craft and effect of system on that craft); *Sears II*, 645 F.2d at 1372-73 (same); *Terrell*, 644 F.2d at 1119, *vacated sub nom. International Ass'n of Machinists & Aerospace Workers v. Terrell*, 456 U.S. 955, 102 S.Ct. 2028, 72 L.Ed.2d 479 (1982), *on remand*, 696 F.2d 1132, 1134 (5th Cir. Unit B 1983) (per curiam) (remanded to trial court to consider "the disparate impact of the . . . seniority system on black employees") (footnote omitted); *Georgia Power I*, 634 F.2d at 935 ("seniority system here did not operate equally on the races but had a disproportionately heavy negative impact on blacks."); *cf. Taylor v. Mueller Co.*, 660 F.2d 1116, 1122-23 (6th Cir.1981).

As to the second *Stockham Valves* factor,[17] the district court found that "legitimate business reasons" justified "the craft and seniority distinction preserved between chair car attendants on the one hand and operating employees, such as brakemen and switchmen on the other," and that such distinctions were "rationally based upon functions and duties of [the] respective crafts and in

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[17] The district court stated this factor as follows: "Is the separation of bargaining units rational and in accord with general industry practices?" *Blankenbaker*, slip op. at 45. The *Stockham Valves* court referred to this factor as "whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice)." *Stockham Valves*, 559 F.2d at 352, *quoted in*, *Sears II*, 645 F.2d at 1372 n. 5. Because in the instant case the relevant seniority units, chair car attendant and brakemen/switchmen, were separate bargaining units, the district court's paraphrase of this second factor was correct.

accord with industry pracrtices [sic]."[18] *Blankenbaker*, slip op. at 47. Aside from the district court's undue reliance on legitimate business reasons, *see ante* p. 1244, it also failed to consider whether the separation of *collective bargaining representatives* was rational or based on racial considerations.

The BRT, the bargaining representative for brakemen/switchmen, limited its membership to whites until 1960. *Blankenbaker*, slip op. at 13-14. There may be a nonracial explanation for the separation of chair car attendants and brakemen/switchmen into separate bargaining units, but there may be no reason in fact for their separate representation other than that one union prohibited black members. *See Gantlin*, 734 F.2d at 989 (bona fide seniority system "bargained for by a unit representing both black and white employees"). For instance, the BRT represented dining car stewards, a nonoperational craft that for many decades was exclusively white and whose duties are analogous to those of chair car attendants. IX R. 1439; III R. 11; III R. 48; III R. 139.[19] Although the

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[18] The district court reached this conclusion because brakemen and switchmen are operating personnel and chair car attendants performed a nonoperating function. *Blankenbaker*, slip op. at 45-46. The district court also noted that in "nations of homogeneous race, e.g., Japan and Mexico, [the] chair car attendant craft has always been operated as a separate craft and maintained under a separate seniority system form [sic] those operating employees." *Id.* at 46 (citing IX R. 1468).

[19] For a discussion of the dispute between the BRT-led stewards and the all-black craft of "waiters-in-charge" which bears an eerie resemblance to the circumstances surrounding

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district court's inquiry, the rationality of the separate *crafts* of chair car attendant and brakeman/switchman, certainly is a proper one, its formalistic application of this factor appears to have led it to impermissibly disregard evidence of possible discriminatory intent.

In analyzing the third *Stockham Valves* factor,[20] the district court found, contrary to its finding in *Sears I*, 454 F.Supp. at 179-80, that the seniority system did not have its genesis in racial discrimination. *Blankenbaker*, slip op. at 47-49. In *Sears II*, we stated that a seniority system has its genesis in racial discrimination if it is created when discrimination is the " 'standard operating procedure' " of the employer. 645 F.2d at 1378 (quoting *Sears I*, 454 F.Supp. at 180); *accord Larkin v. Pullman-Standard Div.*, 854 F.2d 1549, 1577 (11th Cir.1988); *Terrell*, 644 F.2d at 1118; *Georgia Power I*, 634 F.2d at 936. We recognize that this is a narrower view than that taken by some other courts, *see Gantlin*, 734 F.2d at 989; *Taylor*, 660 F.2d at 1122-23. The approach of *Gantlin* and *Taylor*, which would discount evidence of the employer's racially discriminatory practices at the time a seniority system was adopted, actually has the effect of excluding potentially relevant evidence, the error for which we are reversing the district court

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Award 19324, see *Allain v. National R.R. Adjustment Bd.*, 120 F.Supp. 453 (N.D.Ill. 1953), *aff'd sub nom. Allain v. Tummon*, 212 F.2d 32 (7th Cir. 1954); *Dwellingham v. Thompson*, 91 F.Supp. 787 (E.D.Mo.1950), *aff'd sub nom. Rolfes v. Dwellingham*, 198 F.2d 591 (8th Cir.1952); Plaintiffs' Trial Exh. AA, H. Northrup, *Organized Labor and the Negro* 96-97 (1944), *contained in* Addendum to Brief of Appellant, vol. II, tab A-9 at 156 [hereinafter Plaintiffs' Trial Exh. AA].

[20] The district court stated this factor as "[d]id the brakemen-switchmen seniority system have its genesis in racial discrimination?" *Blankenbaker*, slip op. at 47.

here. Our narrower approach, in contrast, does not foreclose consideration of other circumstances surrounding the creation of the particular seniority system. A seniority system's genesis in a racially discriminatory environment is only one factor in analyzing whether the system is bona fide, i.e. adopted and maintained without an intent to discriminate. Consideration of all the surrounding circumstances may lead the court to conclude that the creation and maintenance of the system was nondiscriminatory even if it arose out of, or had its "genesis" in, a discriminatory environment.

Under *Sears II*, then, application of the "genesis" factor entails an examination of the conditions out of which the seniority system arose to determine if those conditions include racially discriminatory practices by the employer. If so, the seniority system has its genesis in racial discrimination. Here, the district court did not have before it any evidence contrary to its own finding in *Sears I* that the seniority system in question was created when "segregation was standard operating procedure on the Santa Fe." 454 F.Supp. at 180. Thus, the district court's finding that the seniority system at issue did not have its genesis in racial discrimination, which resulted from a misapplication of *Sears II*, is clearly erroneous.

In reaching its conclusion, the district court focused on two facts, both of which it firmly rejected in *Sears I* as a basis for finding the system bona fide. *See* 454 F.Supp. at 179. First, the district court noted that the first known collective bargaining agreement with seniority provisions between brakemen/switchmen and Santa Fe was executed in 1892, seven years before the creation of the train porter craft. *Blankenbaker*, slip op. at 48. Based on this fact,

the court found "that the origin in establishing different crafts and seniority systems in the railroad industry generally was not motivated by racial animus." *Id.* Next, the district court found that historical evidence adduced at trial demonstrated that the "organization of the brakemen/switchmen craft and its seniority system was a direct countervailing response to protect its members against favoritism and nepotism in personnel management." *Id.* at 49. Neither of these findings affects the conclusion that the seniority system had its genesis in racial discrimination; rather, they merely support the district court's finding that the separate craft and seniority systems for chair car attendants and brakemen/switchmen were rational.

In its discussion of the fourth *Stockham Valves* factor,[21] the district court never expressly stated whether the brakemen/switchmen seniority system had been maintained or negotiated with the intent to discriminate. The court only noted that, unlike *Sears*, the plaintiffs here never had performed braking duties and there was no evidence that the BRT had ever sought to obtain chair car work for its own members or to force Santa Fe to fire the black attendants. *Id.* at 50.

First, we note that in finding in *Sears I* that Santa Fe's seniority system was negotiated and maintained with illegal purpose, the district court made the following observations:

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[21] This factor was formulated by the district court as follows: "Was the system negotiated and has it been maintained free of any illegal purpose?" *Blankenbaker*, slip op. at 49.

> "The seniority system was created by collective bargaining at a time when there were no black brakemen and no white train porters, at a time when blacks as a class performed only the most menial tasks on the railroad. . . .The unions which maintained the seniority system through negotiations and collective bargaining with the Santa Fe had clauses in their Constitutions which limited membership to white males- . . . .Since blacks were not eligible for membership in the unions, they could not be employed as brakemen or conductors, and they could not be eligible for the economic protection of the seniority systems in question. . . . The seniority system was used by the unions to deprive blacks of their train porter positions."

454 F.Supp. at 180. We upheld this finding on review because the BRT had used the seniority system as a weapon against blacks on the Santa Fe by actively seeking to transfer braking duties to its white-only membership. *Sears II*, 645 F.2d at 1374. None of these facts have changed, and the district court identified no additional facts that would justify a contrary result. Instead, focusing on the differences between the present class and that in *Sears*, the court found "no evidence that the seniority system for brakemen and switchmen was negotiated and maintained for the purpose to banish the employment of black chair car attendants from such craft position on Santa Fe, nor is there any evidence that BRT also made such a demand in its protest for braking duties before the [Board] in 1939," which resulted in Award 19324. *Blankenbaker*, slip op. at 50.

This finding appears to be based on an argument we rejected in *Sears II*. In attempting to avoid liability in *Sears II*, the UTU contended that its efforts culminating in

Award 19324 "were simply 'lawful resort' to administrative agencies to regain the disputed head-end braking duties," and that there was no evidence that " 'UTU demanded that blacks be hired only as Chair Car Attendants or Train Porters.' " 645 F.2d at 1375 (citation omitted). We rejected this contention because the "net effect of UTU's actions was that it gained control of most braking work, and it allocated the work to its white members only." *Id.*

The district court's finding that the BRT did not seek to acquire chair car work for its own members or force Santa Fe not to hire blacks is not clearly erroneous, but is not dispositive of the fourth *Stockham Valves* factor. That the BRT did not seek to prevent blacks from working as chair car attendants does not mean that the seniority system was negotiated and maintained with no intent to discriminate and does not change the effect of Award 19324 on blacks working on the Santa Fe. The import of our review in *Sears II* of the circumstances surrounding Award 19324 was that it was an example of the intentionally discriminatory use of the seniority system.[22] *See*

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[22] Award 19324 is not the only example of the BRT's use of a seniority system to discriminate against blacks. In *Central of Ga. Ry. v. Jones*, 229 F.2d 648 (5th Cir.1956), the BRT and the railroad entered into a contract in 1952 whereby blacks were excluded from holding certain jobs even though they were represented by the BRT. Under the agreement, blacks could use accumulated seniority to avoid layoffs or bid on vacancies or new runs in their crafts, but "negroes [were] not to be used as conductors, flagmen, baggagemen or yard conductors." *Id.* at 649 n. 1. In *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952), the employer, under threat

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id. at 1369, 1374, 1375. This example of discrimination is highly relevant in this case even though the class here has never performed braking duties. As in *Sears II*, the practical result of Award 19324 was that, through the efforts of the BRT, ~~blacks~~ on the Santa Fe were denied the one promotional opportunity they enjoyed. *See id.* at 1376; *Blankenbaker*, slip op. at 10, 14. Since 1956, no blacks on the Santa Fe have been promoted from chair car attendant to train porter, *id.* at 14, and, with few exceptions, no blacks with seniority dates after April 20, 1942, formally performed braking or switching duties until after the passage of Title VII, thus making them ineligible for promotion to conductor or engine foreman. In sum, the effect of Award 19324 was that, until the late 1960s and early 1970s when Santa Fe began hiring blacks in positions that were part of promotional lines of progression, a black hired on the Santa Fe would begin his career as a

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of a strike, agreed with the BRT to fire black train porters on its lines and replace them with white brakemen. The Supreme Court held that the Railway Labor Act "prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers." *Id.* at 774, 72 S.Ct. at 1025. The Supreme Court noted that "these train porters are threatened with loss of their jobs because they are not white and for no other reason," *id.* at 773, 72 S.Ct. at 1025, and that "for more than a quarter of a century the [BRT] and other exclusively white rail unions had continually carried on a program of aggressive hostility to employment of Negroes for train, engine and yard service." *Id.* at 771, 72 S.Ct. at 1024.

chair car attendant and end it as a chair car attendant.[23] On remand, the district court should consider this discriminatory use of Santa Fe's seniority system in making its ultimate finding under § 703(h).

Quite apart from our concerns with the substance of its inquiry, the district court's failure to consider other relevant evidence under this fourth *Stockham Valves* factor is reversible error. For instance, there was evidence in this record from which the district court could find demonstrable manipulation of or deviation from the seniority system, which is particularly strong evidence of the operation or maintenance of the system with an intent to discriminate. *See, e.g., Wattleton v. International Bhd. of Boiler Makers*, 686 F.2d 586, 590-91 (7th Cir.1982) (only whites were successful in transferring based on plant seniority to jobs under defendant union's jurisdiction), *cert. denied*, 459 U.S. 1208, 103 S.Ct. 1199, 75 L.Ed.2d 442 (1983); *Scarlett v. Seaboard C. L. R.R.*, 676 F.2d 1043, 1051-52 (5th Cir. Unit B 1982) (§ 703(h) not available to defendants, including UTU, because of consistent disregard of seniority-based promotional rules when applied to blacks). For example, in the Silsbee, Texas, Seniority

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[23] For example, plaintiff Martin Tuggle testified that he was hired as a chair car attendant on the Santa Fe in 1948. III R. 40. When Amtrak took over passenger rail service in 1974, he joined Amtrak and remained as an attendant until he retired in 1982. *Id.* at 62. Thus, he worked 26 years on the Santa Fe without a promotion. Plaintiff William Zanders was hired as a chair car attendant on the Santa Fe in 1947. *Id.* at 129. He transferred to Amtrak in 1974 and retired in 1981. Zanders worked on the Santa Fe for 27 years without a promotion. *Id.* at 130.

District, the only place where Santa Fe hired blacks as brakemen in any numbers before 1965, *see ante* n. 4, there were no black conductors before the effective date of Title VII, although promotion to conductor was mandatory for white brakemen to remain on the Santa Fe. *Sears I*, 454 F.Supp. at 166 n. 9, 172; Plaintiffs' Trial Exh. BR, Response of Defendant UTU to Plaintiffs' Request for Admissions, Stipulation of Facts, exh. C at 21, *contained in* Addendum to Brief of Appellant, vol. I, tab A-1 [hereinafter Plaintiffs' Trial Exh. BR]. Apparently, the BRT and Santa Fe's seniority based promotional rules for white brakemen were not applied to black brakemen in the Silsbee district. Although no member of the plaintiff class was employed in that district, the treatment of these black brakemen may be evidence of the manipulation of the seniority system with the intent to discriminate.

UTU's failure to execute the 1976 Seniority Modification Agreement also may be evidence of maintenance of the seniority system with an intent to discriminate. The district court found that UTU's "endorsement" of this agreement was not necessary to make it effective. *Blankenbaker*, slip op. at 24. This finding has no support in the record and is clearly erroneous. The testimony cited by the district court reveals that these witnesses were discussing the 1971 "Cross-Craft" agreement. *See* VI R. 803-10, and VI R. 914-15, *cited in Blankenbaker*, slip op, at 24. Other testimony cited by the court actually indicates that UTU's signature was necessary for the agreement to become effective as to the brakemen's and switchmen's rosters. V R. 732, *cited in Blankenbaker*, slip op. at 24; *see also* VIII R. 1308-09. On remand the district court should

consider this discriminatory use of Santa Fe's seniority system in making its ultimate finding under § 703(h).

Finally, the district court did not discuss whether the partial dualization of the brakemen's and switchmen's seniority rosters was evidence of an intent to discriminate. The dualization effort was in response to the concerns of white switchmen about declining yard work. VI R. 887-88; VII R. 1065-68. Dualization did not occur at all in those areas where it was opposed by switchmen, VII R. 1080, and was only one-way where brakemen were not interested in reciprocal rights, *id.* at 1074-75, 1076. The effect of the dualization of some brakemen's and switchmen's seniority rosters was to dilute the seniority of blacks newly hired or transferred into the brakeman craft. *See* IV R. 378-79. If this effect was intentional, it would be strong evidence of manipulation of the seniority system with an intent to discriminate.

The district court discussed only the four *Stockham Valves* factors in deciding that the seniority system was bona fide. But these factors are not talismanic indicators of intent; instead, they serve as a partial means to an end, not the end itself. *See Gantlin*, 734 F.2d at 990 (factors are "nonexclusive list to aid in the determination of whether a given seniority system is bona fide"). A district court cannot mechanically tally the factors and determine a winner. *Cf. Georgia Power I*, 634 F.2d at 935 (court declined to decide whether a "seniority system may be found non-bona fide on the basis of only one of the four" *Stockham Valves* factors) (citing *Sears I*, 454 F.Supp. at 179). The Supreme Court was careful in *Swint* to note that the passage in *Teamsters* upon which the *Stockham Valves* factors were based was "not meant to be an exhaustive list

of all the factors that a district court might or should consider in making a finding of discriminatory intent."[24] 456 U.S. at 279 n. 8, 102 S.Ct. at 1785 n. 8; *see also Terrell*, 644 F.2d at 1119; *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1192 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). Exclusive reliance on the *Stockham Valves* factors may lead a court, as here, to disregard or discount relevant evidence. The district court must consider the totality of the circumstances and any evidence, direct or circumstantial, that bears on the motives of the defendants, whether or not such evidence is relevant to any of the *Stockham Valves* factors. *See Terrell*, 644 F.2d at 1119 (district court's failure to consider additional factors resulted in reversal).

We must remand because our careful review of the record shows that although the district court purported to consider the "totality of the evidence," *Blankenbaker*, slip op. at 51, it failed to consider at least three factors, which do not directly bear on any of the *Stockham Valves* factors, but which might have led to a finding that the seniority system was non-bona fide. First, the district court did not appear to consider or give any weight to our decision in *Sears* that Santa Fe's seniority system was not bona fide. Although our determination in *Sears II* does not have preclusive effect here, *see ante* at pp. 1243-1244, and, as the district court noted, there are significant differences between the plaintiff classes in the respective cases, our finding that the seniority system

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[24] Thus, our prior opinions in *Bach*, 731 F.2d at 668, and *Sears II*, 645 F.2d at 1372 & n. 5, cannot be read as an endorsement of the exclusive use of the *Stockham Valves* factors.

created "employment differences with the intention of discriminating because of race," *Sears II*, 645 F.2d at 1374, has some independent significance in the instant case.

Second, the district court did not consider whether the BRT's efforts in favor of full crew laws was evidence that it maintained the seniority system with an intent to discriminate. Full crew laws on the Coast Lines in Arizona and California, for example, required both freight and passenger trains to carry either two brakemen or a brakeman and fireman. *Sears I*, 454 F.Supp. at 163; Plaintiffs' Trial Exh. BR, exh. B at 3. Evidence in the record indicates that the BRT would not consent to inclusion in these statutes of porter-brakemen or train porters, along with brakemen, and took the position that these laws prohibited the use of persons not holding seniority on the brakemen's roster. *See Beal v. Missouri Pac. R.R.*, 312 U.S. 45, 46-47, 61 S.Ct. 418, 419-20, 85 L.Ed. 577 (1941) (describing events in Nebraska where BRT filed complaint with state commission alleging that railroad violated full crew law by employing train porters instead of brakemen); IV R. 418; *id.* at 458-59, 462-63. These laws had the effect of preventing blacks from serving as brakemen in those states because Santa Fe did not hire blacks as brakemen and the BRT did not allow black members. *Sears I*, 454 F.Supp. at 163; IV R. 418; *id.* at 459; Plaintiffs' Trial Exh. BR, exh. C at 22; *see generally* Plaintiffs' Trial Exh. AA at 52 ("[t]he hostility of the white trainmen toward the Negro has also been a major reason for the passage of many state 'full crew' laws"). Although the plaintiffs here never performed any braking duties, the district court did not evaluate to what extent this was due to the BRT's white-only membership clause, its actions in

obtaining Award 19324, and its actions in seeking full crew laws. Neither did the court review the inferences that might be drawn from collectively examining the BRT's aforementioned conduct. *See Terrell*, 644 F.2d at 1119-20 (district court erred in failing "to focus upon additional factors, such as the avowedly racist policies of the craft unions, and . . . to recognize the cumulative effect of separate pieces of evidence of racial motives").

Finally, the district court erred in not considering Santa Fe's promotional structure within craft divisions and how the seniority system played a role in this structure. In *Georgia Power I*, the employer had assigned all blacks to the lowest job classifications. 634 F.2d at 931. These all-black jobs were placed into separate seniority units. *Id.* Like Santa Fe's seniority system, employees transferring into new seniority units could not carry over accumulated seniority, but seniority in the old unit was retained in the event of layoffs. *Id.* The court of appeals in *Georgia Power I* noted that

> "[u]nlike other seniority units, which were part of lines of progression and through which an employee could advance as he accumulated seniority, the [all black] job classifications were not part of any line of progression. Thus, in order for blacks to advance to a better, higher-paying job, they had to forfeit their seniority."

Id. After examining the disparate impact of the employer's seniority system, whose seniority forfeiture rules "locked in" minority employees, the Fifth Circuit stated that the discriminatory effect of the seniority system "was compounded by the fact that blacks could not progress except by forfeiting their seniority." *Id.* at 935. Although white employees were "locked in" to some

extent because they also forfeited accumulated seniority upon transfer, they could progress on the basis of seniority within their units. The court held that "the seniority system negotiated through the collective bargaining process tracked and reinforced the purposefully segregated job classification scheme maintained by the company and the conclusion is inescapable that the seniority system itself shared in that same unlawful purpose." *Id.* at 936.

Here, after the BRT succeeded in obtaining all braking work for its white members, chair car attendants had "no chance to progress except by transfer to another section with loss of seniority." *See id.* at 931; *compare Gantlin*, 734 F.2d at 985-88, 991-92. Although switchmen and brakeman would forfeit accumulated seniority if they crossed craft lines, they were able to move within their crafts on the basis of seniority, switchmen to engine foremen and brakemen to conductor. If the placement and retention of blacks in jobs without the possibility of promotion was intentional, it would be strong evidence that the system was operated with the intent to discriminate on the basis of race.

The judgment of the district court is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN BLANKENBAKER, et al.,
Plaintiffs,

vs.

UNITED TRANSPORTATION UNION, et al.,
Defendants.

Case No. 82-1984

Consolidated with

GEORGE E. HARVEY, SR.,
Plaintiff,

vs.

UNITED TRANSPORTATION UNION, et al.,
Defendants.

and

RAY E. LANDRUM,
Plaintiff,

vs.

UNITED TRANSPORTATION UNION, et al.,
Defendants.

Case No. 76-31-C6

(Filed June 9, 1986)

MEMORANDUM OPINION AND ORDER

I. *INTRODUCTION*

This is a continuation of a complex and difficult civil rights litigation engendered from *Sears v. Santa Fe Railway Co.*, 454 F.Supp. 158 (D.C. Kan. 1978); *affirmed in part, reversed in part, remanded*, 645 F.2d 1365 (10 Cir.1981); *see*

also Sears, 779 F.2d 1450, 1456, (10 Cir. 1985). The Court in this employment discrimination suit must decide the issue of whether or not defendants, The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") and United Transportation Union ("UTU"), are liable to plaintiffs and the class members for back pay, injunctive and equitable relief, costs and attorneys' fees. Plaintiffs and the class members were black railroad employees; many of them began to work for Sante Fe in the late 1940's. They bring this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Secs. 2000e to 2000e-17, as amended, on their behalf and on behalf of all black male and female Americans employed by Sante Fe as chair car attendants who were never employed as train porters during any period from July 2, 1965 to the present date. The gist of plaintiffs' claims, as characterized by the Circuit Court, was "generally more in the nature of a challenge to the prevailing promotion system that prevented them from ever obtaining the higher-paid brakeman/(switchman) jobs." *Sears v. The Atchison, Topeka and Santa Fe Railway Co. and United Transportation Union*, No. 83-2117, Slip Op. at 5 (10th Cir. Dec. 21, 1984) (Unpublished Opinion). Liability is premised upon the contentions of disparate treatment and disparate impact from the defendants' roles in establishing and maintaining a discriminatory employment policy and a mala-fide seniority system against these black chair car attendant employees in violation of 42 U.S.C. Sec. 2000e-2(a) and -2(c). Santa Fe denies liability of the basis of a certain seniority retention agreements it entered into with the chair car attendants' union that these employees were not inhibited from transferring into any of the higher paying positions within the railroad

company. Both defendants contend that the separately maintained seniority system for the brakemen-switchmen craft, as it was applied to the non-operating chair car attendant craft, was bona fide, neither created nor maintained because of any intent to discriminate on the basis of race, and that they were immunized from liability under 42 U.S.C. Sec. 2000e-2(h). Defendants have also reasserted their contention that plaintiffs' claims are time-barred because they failed to comply with the administrative procedural of the Civil Rights Act, 42 U.S.C. Sec. 2000e-5(e).

In a Memorandum and Order dated September 6, 1984, the Court concluded that the claims by chair car attendants, based on the factual antecedents in *Sears, supra,* were preserved under the equitable tolling doctrine. We also found that the plaintiffs have met the requirements of Rule 23(a), F.R.Civ.P., and have allowed this matter to proceed as a class action. The certified class consists of

> "the named plaintiffs and all other Negro (black) male and female Americans employed by The Atchison, Topeka and Santa Fe Railway Company, at any time, as chair car attendants, exclusive of the provisional employees during summers and holidays, who were never employed as train porters, during any period from July 2, 1965 to the present date."

In the Pre-trial Order, the parties agreed that the stipulated facts in *Sears v. Santa Fe Railway Company,* 454 F. Supp. 158 (D.C. Kan. 1978), are submitted into evidence as a part of the trial record in this case, subject to objections on relevancy and materiality. Of course, Rule 201,

F.R.Evid., allows the Court to take judicial notice of adjudicative facts, particularly those facts that are not in dispute. Trial of this matter was to the Court. Shortly after the trial was completed, the Court was advised that the parties were contemplating settlement. Consequently, disposition of this dispute by the Court was held in abeyance pending the final outcome of the parties' negotiations. An agreement to settle claims for back pay, attorneys' fees, and costs was reached between Santa Fe and the plaintiffs and the class members whom they represent. This agreement, in a form of Consent Decree, has been approved by the Court on January 14, 1986. However, Santa Fe, along with UTU, remains as a party-defendant in this suit for the purposes of injunctive and seniority relief determinations. The Court has considered the testimony adduced at the trial, the documentary evidence and the factual stipulations introduced into the trial record, the briefs of the parties and the applicable law in disposing of this litigation. This Opinion shall constitute the Court's Findings of Fact and Conclusions of Law, as required by Rule 52(a), F.R.Civ.P.

II. *THE PARTIES*

This litigation is a consolidation of three cases, *John Blankenbaker, et al. v. The Atchison, Topeka and Santa Fe Railway Co., et al.*, Case No. 82-1984; *George H. Harvey v. United Transportation Union*, Case No. 76-31-C6; and *Ray E. Landrum v. United Transportation Union*. The Plaintiffs' class claims are predicated upon allegations of discrimination in employment on the basis of race in violation of the Civil Rights Act of 1964, 42 U.S.C. Secs. 2000e *et seq.* The plaintiffs in *Blankenbaker* are a group of black males

who were employed by Santa Fe as chair car attendants until May 1974 when Santa Fe ceased its passenger services. This group was originally a part of the *Sears* class, but was severed from the class on October 29, 1974 by a second amended complaint in *Sears*.[1] *Sears, supra*, No. 82-2117, Slip Op. at 2; *Blankenbaker*, Case No. 82-1984, Slip Op. at 3-6 (D.C. Kan. Sept. 6, 1984).

Plaintiff Harvey filed a Title VII administrative charge with the EEOC on November 9, 1972 – eight days after Sears filed his class action complaint with the Court – received his right-to-sue letter on October 31, 1975, and filed suit on January 29, 1976. In this suit, Harvey brings it "on behalf of himself as a former chair car attendant of the Atchison, Topeka & Santa Fe Railway Company . . . and on behalf of all other Negro Chair Car Attendants who have been, are now, or were prior to May 1974, employed by Santa Fe. . . ." Harvey settled his claims against Santa Fe on June 3, 1973. His remaining claims against UTU are consolidated with the *Blankenbaker* action.

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[1] The fifteen class representatives in *Blankenbaker* are: John H. Blankenbaker, Eugene Bunch, James Bunch, Leslie Calvin, Mose Covington, Homer Jackson, Alfred Lyons, Lonnie Moore, Victor Powell, William Smith, Martyne Tuggle, T. F. Van Winkle, Earl Walker, Green Junior Wallace, William Zanders. Although each of these class representatives filed an administrative grievance on various dates between March and October, 1976 with the EEOC and received their right-to-sue letters on September 27, 1982 from it, we have concluded that the events and proceedings in the early phase of the *Sears* litigation equitably tolled the applicable limitations period on claims by chair car attendants.

Plaintiff Landrum filed a Title VII charge with the EEOC on February 7, 1973, obtained right-to-sue letter on October 31, 1973, and intervened in the *Sears* action. Upon a determination that he did not belong to the train porter class in *Sears*, Landrum was excluded from that suit. Landrum then settled his claims against Santa Fe on July 27, 1976. His remaining claims against UTU are consolidated with the *Blankenbaker* action. *See Sears*, W-4613, Memorandum and Order (D.C. Kan. Aug. 8, 1983).

Santa Fe is a Delaware corporation engaged in interstate commerce. The Santa Fe railroad lines extend from Chicago, Illinois, west to San Francisco, California and south to Houston, Texas. At all times material in this suit, the Santa Fe rail network was organized for operating purposes into three "Grand" Divisions, which were called the Eastern Lines, the Western Lines, and the Coast Lines. The Eastern Lines operated in Illinois, Iowa, Missouri, Kansas, Oklahoma, Colorado, and New Mexico. The Western Lines operated in Kansas, Oklahoma, Texas, Louisiana, and New Mexico. The Coast Lines operated in New Mexico, Arizona, and California. *Sears*, 454 F.Supp. at 160, UTU Exh. No. 100; Murphy, Vol. V, 1061-1063.

UTU is an unincorporated labor union consisting of an international union, local unions, and intermediate bodies. UTU was formed by merger of four labor organizations on January 1, 1969. UTU or two of its predecessors, the Brotherhood of Railway Trainmen ("BRT") and the Order of Railway Conductors and Brakemen ("ORC&B"), have been the collective bargaining representatives in labor matters for brakemen, switchmen and

conductors working for Santa Fe since 1892. *Sears, id.*; Hart, Vol. IV, at 865.

The Brotherhood of Sleeping Car Porters ("BSCP") is an unincorporated labor association chartered by the American Federation of Labor on May 8, 1929, and was certified on April 5, 1946, by the National Mediation Board to represent the crafts of train porters as well as chair car attendants employed by Santa Fe. BSCP merged with the "System Division" of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC") on April 1, 1978. Although BSCP acted during the relevant period of this class action suit as the collective bargaining representative of the chair car attendants, BSCP has not been named as a party to this suit. *Cf. Sears, id.*; Santa Fe Exh. No. 1 (BSCP and Santa Fe Collective Bargaining Agreement, dated May 1, 1950); Santa Fe Exh. No. 144, Stipulations No. 1(Z) and No. 4; Gossett, Vol. IV, at 836-837.

III. *THE CLAIMS AND DEFENSES*

The Circuit Court noted in *Sears* that the basis of the chair car attendants' claims does not involve "a situation of equal pay for equal work." *Sears*, 645 F.2d 1365, 1378 (10th Cir. 1981); *see also* No. 83-2117, Slip Op. at 5 (10th Cir. Dec. 21, 1984). Rather, the gravamen of plaintiffs' claims is that the employment system for promotion to the crafts of brakeman/switchman, which was practiced by and maintained through the collective bargaining agreements in the post-Act period (July 2, 1965) between Santa Fe and UTU, deprived chair car attendants the opportunity to hire into these higher-paid craft positions

because of their race. Pre-trial Order, Jan. 8, 1985, Dkt. 105. The specific complaint by the plaintiffs of UTU's role in acting with Santa Fe to deny the chair car attendants' opportunity to work as brakemen/switchmen is that UTU has continued in the post-Act period to adhere to a craft seniority system which has an adverse impact on them by refusing to provide carryover or retroactive seniority to an incumbent chair car attendant who desires to work in a new craft as a brakeman/switchman based on his chair car seniority date. *Id.*, Appendix G.

Defendants do not deny the historical record reflected in the findings in *Sears* that there was discriminatory hiring by Santa Fe and membership practices by UTU's predecessors against black employees in the pre-Act period. Defendants contend, however, that these pre-Act discriminatory policies and practices did not continue subsequent to July 2, 1965. Santa Fe points out that its company personnel records show that as early as 1962 Santa Fe was hiring blacks as brakemen/switchmen. Santa Fe further argues that under the March 23, 1971 Agreement and the 1976 Seniority Modification Agreement efforts were made to encourage chair car attendants to transfer to operating crafts. Both defendants assert that the separately maintained seniority systems, one for chair car attendants and that other for brakemen/switchmen, were valid under Section 703(h) of the Civil Rights Act, which permits an employer to utilize bona fide seniority systems even if such systems operate to perpetuate past racial discrimination. *Id.*, Appendix H, I.

IV. *DIFFERENT CRAFTS IN SANTA FE OPERATIONS*

Until May 1974, Santa Fe operated both passenger and freight services throughout various states west of the Mississippi River to the west coast. Functionally, employees on Santa Fe passenger trains were categorized into two groups. The "operating crew" consisted of a conductor, a train porter (head-end brakeman), a rear-end brakeman, a fireman, and an engineer. The "non-operating crew" consisted of service personnel. Braking duties were performed by brakemen. Their duties included the inspection of train cars, the testing and use of hand and light signals for the movement of trains, opening and closing of switches, coupling and uncoupling cars, hose and chain attachments, reporting to and receiving instructions from the trainmaster and the conductor. *Sears, supra,* 454 F.Supp. at 160; Santa Fe Exh. No. 145, No. 1; Gamst, Vol. VII, at 1423-1428. The chair car attendants belonged to the non-operating crew. Their primary duties were to care for the passengers' comfort and convenience, and were generally limited to the interior of the passenger trains. *Sears, id.*, at 164; Gossett, Vol. IV, at 833; Burns, Vol. VI, at 1283; Sante Fe Exh. No. 3.

Switchmen were also considered to belong to the operating crew. They performed essentially similar braking and switching duties as brakemen did, except that the switchmen worked in regular hours and within an assigned geographical location. Easley, Vol. VI, at 1222-1223; Murphy, Vol. V, at 1064-1065.

The National Mediation Board classified railroad employees into different crafts on the basis of their traditional work functions. Employees in a given craft were generally organized as a labor unit with a certified representative acting on their behalf to negotiate and to maintain agreements with the rail carriers under the Railway Labor Act. *See Sears, supra,* 454 F.Supp. at 164 n. 5. The conductors on Santa Fe were represented by the Order of Railway Conductors some time in the middle of the Nineteenth Century. In 1926, following the enactment of the Railway Labor Act, ORC was certified as the conductor craft representative. In August 1954, this unincorporated labor association was renamed as ORC&B. Similarly, both switchmen and brakemen, generally known under the generic name of "trainmen," were represented by BRT, one of UTU's predecessors, since BRT was certified in 1926. *Id.* The train porters (head-end brakemen) and chair car attendants were represented by BSCP, which was certified as the representative for these two crafts in separate proceedings in 1946. *Id.*

Train porters and full-time chair car attendant employees of Santa Fe were designated as entry-level positions for black males. Although there were a number of instances between 1918 and 1959 in which Santa Fe hired blacks as train porters, the plausible employment position for which a black job applicant could apply was that of chair car attendant. Until 1959, a chair car attendant could be promoted to the position of a train porter by taking a rules examination, passing a physical examination, and completing and required hours of road trips on passenger trains. A newly qualified train porter, while he would normally continue to work and to accumulate

his seniority as chair car attendant, could bid to work as an extra-board train porter on a temporary basis.

By contrast, the entry-level for a white job applicant during the same period was the brakemen position. The qualifications for a brakeman applicant were essentially similar to those for train porters, except a brakeman obtained his actual work experience from train runs on local freight. Before 1960, a newly hired brakeman began as an extra to fill any temporary vacancy caused by illness, vacation or otherwise. After accumulating sufficient seniority, a brakeman could obtain a regular freight or passenger braking job. As factually detailed in *Sears, supra,* train porters performed comparable duties as brakemen on passenger train runs, yet their wages and employment benefits were far less favorable than those given to brakemen.

V. *SENIORITY STRUCTURE*

Santa Fe has maintained seniority districts and published seniority rosters for each craft within each district. The seniority roster is the earliest date of continuous service by an employee with Santa Fe in a particular craft and within a particular district. Seniority standing in a craft determines an employee's promotion opportunities as well as his right to protect work within his craft and district. Generally, seniority is not transferable from one seniority district to another or from one craft to another. *Sears, supra,* 454 F.Supp. at 165.

The seniority date for a Santa Fe chair car attendant began with his employment as a chair car attendant. The same procedure applied to an employee who became

qualified as a train porter. A train porter, in addition to accumulating seniority on the train porter roster, also maintained his seniority standing on the chair car attendant roster. The historical evidence shows that the first collective bargaining agreement between BSCP and Santa Fe was executed on May 1, 1950. It set forth the provisions on seniority and various employment conditions for chair car attendants. Santa Fe Exh. No. 1.

The seniority date for a Santa Fe brakeman or switchman began as of the date of his employment with Santa Fe either as a brakeman or switchman. The seniority system for these crafts, as well as for the conductors, was established under the collective bargaining agreements negotiated by BRT and ORC&B with Santa Fe. Until their merger into UTU in 1969, BRT and ORC&B were separate labor unions. Each was certified to represent its respective craft on Santa Fe.

VI. *HISTORY OF BRT AND ORC&B, AND AWARD 19324*

Since 1938, and for many years, BRT was a labor union whose Constitution governing membership admissions provided that race was one of the membership requirements. This requirement that a candidate who was employed as a trainman for at least one month prior to application for admission be white was retained by BRT until 1960. Plaintiffs Exh. D. Similarly, from 1934 to 1966, the Constitution of ORC&B also had an all white membership requirement. Plaintiffs Exh. J. The race requirement was not the only means by which BRT sought to obtain all braking duties for its members. The animosity

directed toward black train porters by BRT was well-documented in the annals of judicial opinions. Beginning no later than 1920, BRT made several attempts, and was successful to transfer head-end braking duties from black train porters to white brakemen. *See Sears, supra,* 454 F.Supp. at 167-168. Upon remand from the district court in proceedings known as the *Hunter* litigation, the National Railroad Adjustment Board on October 14, 1959 held in Award 19324 that only those train porters (some of whom were formerly chair car attendants) holding a seniority date prior to April 20, 1942 could continue to work on Santa Fe as head-end brakemen. All other train porters with a seniority date subsequent to April 20, 1942 were demoted to the position of chair car attendant. It is noted that since 1956 Santa Fe had not hired or promoted any chair car attendants to the position of train porters. The named plaintiffs and the class members whom they represent in this action worked only as chair car attendants on Santa Fe. None of whom were promoted to this position of train porters, although some of the named plaintiffs began to work as chair car attendants as early as 1943. *See* Santa Fe Exh. No. 147.

VII. *DUALIZATION OF BRAKEMAN-SWITCHMAN SENIORITY ROSTERS*

As noted earlier, brakemen and switchmen performed basically the same duties. The only difference between them is that brakemen performed their assigned functions between train yards or terminals while switchmen did so within the general confines of a yard or terminal. While their craft functions and duties were the same, for historical reasons relating to railroad operation

and technology, the yard and road work was performed by two separate seniority rosters of employees with separate yard and road seniority. Hart, Vol. IV, at 876-879. Thus, for example, a yard switchman at the Santa Fe Argentine Yard in Kansas City, Kansas would have no seniority to work over the road east to west, into or out of Kansas City Terminal. Conversely, a road brakeman who held seniority rights into the Kansas City Terminal from the east and west would have no seniority right to work in the Argentine Yard. This mutually exclusive seniority arrangement generally prevailed throughout the Santa Fe system until 1960 when modifications to the seniority agreements were made to dualize the rosters of these two crafts. *See generally* Murphy, Vol. V, at 1065-1081.

"Dualization" of seniority rosters is a process by combining road brakeman and yard switchman seniority rosters and placing each one under the other as of the date of the dualization agreement. Under this consolidating arrangement, the most senior road brakeman would take a position on the yard switchman roster as a new hire; and the first person on the yard switchman roster would take seniority following the last person on the road brakeman roster. Hart, Vol. IV, at 889. The earliest dualization agreements on the Santa Fe system occurred in 1959 on the Coast Lines. UTU Exh. 103-105. The first dualization agreements on the Eastern Lines occurred between 1960 and into 1970's. The dualization process between these two crafts were never fully implemented in all seniority districts. In the Kansas City Division/ Eastern Division, the dualization process of the brakeman and switchman crafts occurred April 1, 1971. UTU Exh. No. 11; Murphy, Vol. V, at 1073-1079. It is said that only

the rosters of the brakemen and switchmen were merged. Hart, Vol. IV, at 890-891. However, under the April 1, 1971 Agreement, only those brakemen in the Eastern Division hired after the effective date of the Agreement will hold dual rights on both of the road and yard seniority rosters. Those brakemen who had a seniority date prior to April 1, 1971 still would have to forfeit their existing seniority if chosen to work as switchmen at the Argentine Yard. Murphy, Vol. V, at 1077-1078.

VIII. *BSCP AND SANTA FE AGREEMENTS ENTERED BETWEEN 1950 AND 1973*

The first written collective bargaining agreements for chair car attendants entered into between BSCP and Santa Fe was on May 1, 1950. Santa Fe Exh. No. 1; Burns, Vol. VI, at 1288. Article III of the Collective Bargaining Agreements sets forth the seniority provisions for chair car attendants.[2] Prior to this time, the seniority system for chair car attendants had been maintained by Santa Fe on the basis of custom and practice.

The next major agreements was known as the "Feb. 7 Agreement." On February 7, 1965, Santa Fe entered into a mediation agreement with five unions (not including the BSCP, BRT & ORC&B). Santa Fe Exh. No. 4. A year later, on February 8, 1966, BSCP and Santa Fe extended the Feb. 7 Agreement and their interpretations of this Agreement

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[2] *But see Sears*, 645 F.2d at 1379, where the Circuit Court noted that "until the February 7 (, 1966) agreement the chair car attendants had no collective bargaining agreement giving them seniority protection." We find the evidence in this case here, as well as in *Sears*, 454 F.Supp. at 165, shows the contrary.

to chair car attendants. Santa Fe Exh. No. 5. The Feb. 7 Agreement was characterized basically as an unemployment compensation provision. Tuggle, Vol. I, at 76. It guaranteed a chair car attendant certain level of annual income, $849.00 a month, if he was furloughed or worked at a job paying lower than the guaranteed income. A chair car attendant received protective payments under this Agreement until he reached the age of 70 or retired, failure to obtain a position available to him in the exercise of his seniority, or in any period in which he occupied a position not subject to the working agreement. *See Sears, supra,* 454 F.Supp. at 169; Burns, Vol. VI, at 1274-1277, 1297. Once a chair car attendant reached the age of 70, retired, or resigned on his own, he received retirement pay benefits. Burns, *id.*, at 1276. Some chair car attendants are still receiving the Feb. 7 Agreement payments. Burns, *id.*, at 1278.

With the steady decline in the business of passenger services on the one hand and the increased efforts as a Government contractor for postal service to comply with the requirements of equal employment opportunity during mid-1960's, *see* Santa Fe Exh. No. 126-72, Santa Fe had a business reason to place chair car attendants in other positions because Santa Fe would have to pay the guaranteed income to these employees under the Feb. 7 Agreement whether they were working as chair car attendants or not. In this respect, Santa Fe would not have to pay protective payments to a chair car attendant who worked in a position with an income higher than that guaranteed by Feb. 7 Agreement. Burns, Vol. VI, at 1294.

In 1967, BSCP became concerned that some of its members could unknowingly relinquish their Feb. 7 protections had they applied for and were accepted by Santa Fe as brakemen or switchmen. Santa Fe Exh. No. 24. A series of negotiations between BSCP and Santa Fe took place from 1967 to 1971. *See* Santa Fe Exh. Nos. 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36-44, 38, 41, 45, 47, 48, 49, 50, 52, 55, 100-F. The main subject discussed in these exhibits was on seniority retention and non-forefeiture of Feb. 7 protections for chair car attendants who chose to transfer to another craft. Local representatives of BSCP participated in these negotiations. Seymour, Vol. III, at 740-752, Vol. IV, at 771-772. On February 17, 1971, the Vice-President of BSCP sent to each local representative a draft of the cross-craft agreement for approval at the local level. Santa Fe Exh. No. 100-F, Shackleford Depo. Exh. 3; *see also* Santa Fe Exh. Nos. 42, 44. With only one disapproval, Santa Fe Exh. No. 100-F, at 55-56, Exh. No. 18, the essence of the proposed cross-craft agreement received strong support from the local representatives. *Id.*, Shackleford Depo., at 34-64, 69-70, Exh. No. 1 through 24.

The gist of the March 23, 1971 Cross-Craft Agreement was that it permitted chair car attendants to transfer to any position including but not limited to brakemen-switchmen positions while maintaining their chair car attendant seniority standing in the chair car attendant craft. Santa Fe Exh. No. 7. Under this Agreement, a chair car attendant who hired out before May 1, 1974 in a new craft had the right to return to work as chair car attendant and to claim his Feb. 7 protections if there was insufficient work in the new craft. Burns, Vol. VI, at 1293; Santa Fe Exh. No. 7. The only requirement for a chair car

attendant, who had transferred to but did not desire to remain in a new craft, to return to his chair car attendant position was to give a notice of such intention to Santa Fe and BSCP. Santa Fe Exh. No. 7, Section (1)(b)(iii); Santa Fe Exh. No. 145, Stipulation No. 82. It is said that the March 23, 1971 Agreement was a unique agreement at that time, which did not exist for crafts other than chair car attendant. Burns, Vol. VI, at 1292-1293.

There is testimony by named plaintiffs that they did now know about the negotiations on the cross-craft agreement or of its substances. Zanders, Vol. I, at 154; Powell, Vol. I, at 185; Jackson, Vol. II, at 326. The written documents which refute this assertion have credibly demonstrated that the proposed agreement was disseminated and discussed at every local unit, however. *See*, Santa Fe Exh. No. 100-F, Shackleford Depo. Exh. No. 1 through 24; Rawlins, Vol. I, at 29-30. BSCP considered its effort in obtaining the March 23, 1971 Agreement was an important achievement because it would provide significant employment benefits and protections for its union members. Woolfolk, Vol. II, at 511. BSCP undertook steps to publicize and to implement this Agreement. Each chair car attendant with a known address was sent a copy of the Cross-Craft Agreement. Seymour, Vol. IV, at 787. In addition, Santa Fe issued instructions to each of the headquarter points and divisions that a copy of the Cross-Craft Agreement be given to each of the chair car attendants. Gillmore, Vol. VII, at 1374. In the Middle Division, at Newton, Kansas, the administrative clerk in that office wrote a letter to each chair car attendant in that division, in which he explained to the chair car attendants of their rights under the Cross-Craft Agreement and encouraged

them to "try to hire out as switchman/brakeman." Johnston, Vol. VI, at 1197. The Santa Fe management also apprised the Superintendents who had the authority in hiring employees into the operating crafts of the substances of the Cross-Craft Agreement. Santa Fe Exh. No. 126-72. To implement this Agreement, a Santa Fe memorandum from H.D. Fish, Assistant General Eastern Lines, dated March 30, 1971, instructed the hiring authorities that

> "whenever it is anticipated it will be necessary to hire new employees, chair car attendants should be advised of the anticipated openings and encouraged to apply for the positions for which they could qualify. If such notifications are made a matter of record they can be used to support affirmative action on our part to advance or promote members of a minority group. The Agreement itself, having been conceived and pursued to a conclusion by the Carrier, demonstrates our willingness to assist minority groups to expand their employment opportunities."

Id., at No. 126-75; *see also* Lough, Vol. VI, at 1187-1188, Santa Fe Exh. No. 126-29. Some chair car attendants, who met the medical requirements and passed the necessary rules examinations, transferred to the brakemen-switchmen crafts under the Cross-Craft Agreement. Santa Fe Exh. No. 100-F, at 105, Harvey, Vol. II, at 395; Woolfolk; Vol. II, at 493; Seymour, Vol. III, at 739. Other chair car attendants on the Denver District also exercised the opportunity to go into another crafts. *See* Woolfolk, Vol. II, at 500.

In anticipating the termination of its passenger rail service, Santa Fe, based on a Congressional enactment,

adopted the Appendix C-1, which provided arrangements for those employees who would be affected by its transfer of intercity passenger service to Amtrak. Santa Fe Exh. No. 6; Burns, Vol. VI, at 1290-1291. Appendix C-1 was considered as an extra employment protective measure as applied to chair car attendants who intended to go to work for Amtrak in that employment capacity. Burns, *id.*, at 1295. The essence of Appendix C-1 was similar to that implemented under the March 23, 1971 Agreement. It reassured Santa Fe chair car attendants who would become employees of Amtrak that they would be allowed to exercise their existing protective benefits and seniority rights. *See* Santa Fe Exh. No. 122-43, -43A, and -43B. A supplemental agreement to Appendix C-1 entered into in 1973 further set forth the conditions where employees affected by the takeover of passenger service by Amtrak must meet in order to retain the entitlements provided under the existing labor agreements. Santa Fe Exh. No. 8; Burns, *id.*, at 1296-1297.

IX. *1976 SENIORITY MODIFICATION AGREEMENT*

Amtrak took over the on-board passenger service on May 1, 1974. While some plaintiffs of younger age retained their employment with Santa Fe by working as new-hired brakemen-switchmen, most of the plaintiffs elected to go with Amtrak as service attendants. On March 15, 1976, Santa Fe participated, along with many other railroad carriers, in endorsing a Seniority Modification Agreement entered into between the National Carriers' Conference Committee and the Brotherhood of Railroad Signalmen. Like the March 23, 1971 Cross-Craft

Agreement designed for chair car attendants, this 1976 Agreement allowed the opportunities for minority and female employees who had continuous employment on or before August 31, 1971 with an endorsing railroad company to transfer to any crafts or positions within that company if they met the conditions which they sought to fill. Santa Fe Exh. No. 9. Under this Agreement, an employee who transferred to a new craft under which a vacant position otherwise was not filled by an incumbent with the requisite seniority right to the position of that craft, was allowed to carryover his or her previously accumulated seniority credit to the new craft seniority roster. *Id.*, at Paragraph II. This employee was also allowed to retain his previously established seniority for a period necessary to acclimate himself to the new position. If he decided to return to his old craft, he could exercise his seniority standing to regain his former employment position. *Id.*, at Paragraph III.

It is undisputed that UTU and its predecessors did not participate in any of these seniority retention agreements, nor did any of these agreements require UTU or its predecessors' endorsement in order to fully implement it. Seymour, Vol. III, at 732; Seymour, Vol. IV, at 803-810; Hart, Vol. IV, at 914-915. On the other hand, Santa Fe has been a "union shop" since 1966. A new employee working in a craft represented by a union is required to become a member of that union within a certain period of time. *See* Brown, Vol. V, at 950; Santa Fe Exh. No. 144, Stipulation T; Rawlins, Vol. I, at 82-84.

X. *COMPARISON OF EMPLOYMENT AND LABOR MARKET STATISTICAL EVIDENCE*

In Title VII cases, plaintiffs generally present either a disparate treatment or disparate impact theory, or both as the chair car attendant plaintiffs are asserting here, of discrimination. Under either theory, plaintiffs have the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. This can be accomplished by applying a given set of relevant statistical evidence to either theory. In a class action alleging discrimination in promotion, plaintiffs must show that it was the employer's regular and standard practices in selecting employees for promotion "in a racial pattern significantly different from the pool of applicants." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425, 45 L.Ed.2d 280, 300-301 (1975). Absent a valid explanation, statistical proof of a substantial and gross racial or ethnic imbalance in the defendant's work force "is often a telltale sign of purposeful discrimination." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n. 20, 52 L.Ed.2d 396, 418 n. 20 (1977). The same statistical evidence can be used to demonstrate a prima facie claim of disparate impact from employment practices or policies which, although facially neutral in its treatment of different groups, in fact result more unfairly on one group than another and cannot be justified by legitimate business reasons. *Hazelwood School District v. United States*, 433 U.S. 299, 307-308, 53 L.Ed.2d 768, 777 (1977); *Teamsters, supra*, at 339, and 335 n. 15.

The statistical analysis involves an evaluation of the pool of individuals available and qualified for employment consideration in a craft and the percentage of plaintiffs

employed in that craft. Whether or not a sound inference of discriminatory impact or purpose can be drawn based upon the percentage of plaintiffs hired or promoted by defendants depends upon the manner in which the experts select the data to build a model of a proper labor market for statistical comparison. The parties are in substantial disagreement on this issue, and have presented contradictory expert opinions based on irreconcilable empirical data. Plaintiffs contend that the statistical evidence, together with the anecdotal testimony by named plaintiffs, establishes a prima facie case of discrimination. Defendants, on the other hand, assert that plaintiffs' statistical proof is inaccurate and that any unevenhanded impact from a facially neutral seniority system is based on a rational craft distinction in the nature of the job functions performed by each craft.

Plaintiffs employed Professor William Terrell as their expert witness who prepared the statistical studies and testified both in *Sears* and this case. Plaintiffs have added the employment statistics on the Coast Lines to Santa Fe employment data for brakemen, switchmen, and conductors on the Eastern Lines and Western Lines as demonstrated in *Sears*. Terrell, Vol. III, at 584-586. It is noted, however, that the employment statistics between 1965 and 1973 on brakemen and switchmen on the Eastern Lines and Western Lines differ from those repeated in the district court Opinion in *Sears*, although all of these exhibits compiled and sponsored by Terrell point to the same information source supplied by Santa Fe. *Compare* Plaintiffs Exh. BL, S-0, S-1 *with* Footnote 12, *Sears, supra*, 454 F.Supp. at 170. Adding to these numerical irregularities is Santa Fe's belated claim that it discovered the employment statistics it had supplied to Terrell in *Sears*

were erroneous, because Santa Fe "has found in its employ blacks who have been hired at least as early as 1962 in the operating crafts of brakemen/switchmen." *See* Case No. 82-1984, Dkt. 96. To support this assertion, Santa Fe presented Donald Florez Tousant, a black male who was employed by Santa Fe as switchman/brakeman at the Los Angeles Terminal Division on the Coast Lines on June 9, 1962. Tousant, Vol. V, at 933. He testified that there were 10 student switchmen in his switchman training class in 1962, five of whom were black. *Id.* By contrast also, UTU's exhibits present a different set of statistical employment figures on the numbers of black brakemen/switchmen on the Eastern Lines. It is not clear that the employment data represented in UTU's exhibits purport to reflect this claim on newly discovered information. We note, however, that these exhibits uniformly show that there were 50 black brakemen-switchmen, 8 more than those reported in Plaintiffs Exh. BL, employed by Santa Fe among its four divisions on the Eastern Lines between 1968 and 1972. UTU Exh. No. 80, 84, 85; Petersen, Vol. V, at 959, 1014-1015.

Both plaintiffs' and defendants' experts conducted statistical studies to deduce on a mathematical basis whether or not race was a probative factor in employment decisions. These analyses compare the actual percentage of blacks hired as brakemen-switchmen and the expected percentage of blacks in the available labor pool. This was used to evaluate any signifiicant [sic] deviation from the probable statistical values extrapolated by a random selection from this pool of the black labor force, given the total number of employees hired. Terrell, Vol. III, at 577-579; Petersen, Vol. V, at 957-964, 1028-1030.

Plaintiffs Exhibit BL, Table S-2 is a year-by-year analysis of the Santa Fe Lines system for brakemen-switchmen and conductors between 1965 and 1973. Table S-3 uses the same analytical format for chair car attendants. In Table S-2, it shows that there was a gradual increase in the percentage of black brakemen-switchmen, from 0.7844% in 1965 to 3.5453% in 1973 with the highest being 3.6086% in 1972, employed on all three Santa Fe Lines (including the Silsbee District in Texas). Table S-2 also shows that the percentage of blacks employed as conductors ranged from 0% in 1965 to 1.4877% in 1973, 1.6270% being the highest in 1972. Both this Table and Table S-0 represent that during these years there were no black conductors on the Coast Lines and Eastern Lines. Table S-3 indicates that the percentage of blacks in the chair car attendant craft varies from 100% to 77.8% during the same period. Based on the census reports on major urban areas in which there were at least 25,000 "non-whites," *see* Table C-2, or "negroes," *see* Table C-1, amongst a population of at least 250,000, Terrell constructed several comparative labor market models[3] by selecting the statistics for the number of blacks or non-whites who were 25 years of age or over and had a high school and up to three years of college education. Terrell computed that 8.6319% "non-white" or 9.771% "negro" belonged to this hypothetical labor pool, from which he believes that Santa Fe "could"

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[3] Table C-3 is developed by using state-wide statistics. They covered Kansas, Illinois, Colorado, Texas, and New Mexico. This table indicates that labor pool is 5.5591% for "non-white" in 1960 and 6.9907% for "negro" in 1970. Terrell primarily relied on Table C-1, C-2 to form the basis of his opinion. Plaintiffs Exh. BL, at 8, Terrell, Vol. III, at 635-637.

draw its employees for the operating crafts. Terrell, Vol. III, at 603. By comparing these statistics, Terrell suggested that the disproportional distributions of black labor force within Santa Fe indicate that "there was crowding into the jobs of train porter and chair car attendant and exlcusion [sic] from the jobs of conductor and brakeman." *Id.*, at 583. He was of the opinion that this anomalous employment pattern developed over the years in question "could not have occurred by chance in the sense of chance operating impartially with respect to race." *Id.*, at 582.

Defendants' expert, Professor David Petersen, challenges the accuracy and relevancy of Professor Terrell's statistical studies and the soundness of his conclusion. Defendants assert that the selection of statistical data for building a relevant labor market must reasonably relate to the scope of the employer's business and the geographical areas from which it draws applications and employees. *See Hazelwood, supra,* at 310-312; Petersen, Vol. V, at 980-989, *see generally* Wright, Vol. VII, at 1320-1337. Petersen discounts the validity of Terrell's choice of using the population ratio for just the urbanized areas of certain cities. Petersen, Vol. V, at 982-999. By contrast, Petersen presented studies on the geographical areas within the four divisions on the Eastern Lines where the majority of named plaintiffs either resided or worked. He examined the actual hiring statistics on each division hiring point and weighed each labor area on a county-wide basis by the number of jobs actually in that area. *Id.*, at 966-976; UTU Exh. No. 81, 82, 84, 85. His numerical findings are that the availability rates of blacks for employment between 1968 and 1972 range from 1.37% to 2.26% on

Colorado Division, 4.40% to 5.96% on Eastern Division, 7.49% to 10.86% on Kansas City Division, and 1.70% to 2.22% on Middle Division. By comparing the hiring rate of black brakemen-switchmen which occurred before July 2, 1965 and that recorded subsequent to the effective date of the Civil Rights Act, Petersen pointed out in his studies that the statistics from 1968 to 1972 show there is no significant disparity between the percentage of blacks placed into the brakemen-switchmen craft and the availability of blacks in the relevant labor market from which Santa Fe might reasonably be expected to draw them to fill these positions. *Id.*, at 957-976, UTU Exh. No. 80, 84, 85. On the basis of the statistical data for the period and the geographical areas studies and sponsored by Petersen, defendants argue that no reasonable inference could be drawn that race played an illegal role in employment decisions in placing qualified black applicants into the brakemen-switchmen vacancies.

Contrary to the illusion of certainty which statistical evidence may create and the degree of reliance which the parties have placed on statistical analysis, it does not dispose of the issues we are required to determine in this case. This is a case which challenges the promotion system maintained by Santa Fe. The fact that the plaintiffs; statistics show that the first black appeared on the brakeman rosters in 1968 on the Eastern Lines suggest that the color-bar which had kept blacks from working in the formerly all-white position was partially erased, if not completely removed at that point in time. Non-quantifiable variables such as self-interest, greed, predispositions – human behavior, values and deeds that we often judge in hindsight – are not always manifestly predictable by

statistics. Inference drawn from disparate statistical proof is usually inconclusive and must be tempered by other evidence which breathes "the cold numbers convincingly to life." *Teamsters, supra,* at 339.

XI. *INDIVIDUAL ANECDOTAL EVIDENCE*

Outside the Silsbee District, Texas, where Santa Fe employed blacks as brakemen from the early 1900's, Santa Fe presented evidence that blacks were hired into the operating crafts in other districts as early as 1962 and throughout the 1960's into the early 1970's. To prove this, Santa Fe called a number of witnesses, including two blacks who were hired as switchmen before the effective date of the Civil Rights Act. Donald Tousant is a black who was hired as a switchman at the Los Angeles Terminal in June 1962. He recalled that when he hired out as a switchman in 1962 there were five out of ten in his switchman training class that were black. One of those blacks was a transferring chair car attendant. Between 1962 and 1967, he recounted that Santa Fe hired approximately 50 blacks at Los Angeles as switchmen-brakemen. Tousant, Vol. V, at 933-936. Jerry Brown was the other Santa Fe witness who has been employed by Santa Fe at the Chicago Division as switchman since March 1965. At trial, he reviewed Santa Fe Exhibit No. 106, a Chicago Division switchmen seniority roster for 1965, and identified at least five blacks hired along with him at that time. He recalled that there were blacks hired as switchmen at the Chicago Division between 1967 and 1971. Brown, Vol. V, at 940-941.

There is evidence to show that some chair car attendants were aware that Santa Fe was offering jobs to chair car attendants as brakemen and switchmen in 1967. Indeed, the chair car attendant union, BSCP, protested in its letter of November 16, 1967 to Santa Fe that its members could unknowingly lose their Feb. 7 protection upon transferring to a new craft. Santa Fe Exh. No. 25. Plaintiff Homer Jackson knew of the Santa Fe job offers in the brakemen-switchmen craft and several chair car attendants in his district in Fort Worth, Texas transferred and became brakemen-switchmen. Jackson, Vol. II, at 331-340. Plaintiffs Powell and Walker were offered the opportunity to work as brakemen-switchmen in 1970; both of them turned down the offer because a transfer to the operating craft at that time would require forfeiture of their chair car attendant seniority. Powell, Vol. I, 182, 194-197. Plaintiff Moore was hired by Santa Fe as a switchman in 1969. His employment was terminated by Santa Fe because he missed too many calls for work. He was rehired by Santa Fe as chair car attendant in 1970, transferred to the switchman position in 1971, and later resigned from that position and returned to work as a chair car attendant. Santa Fe Exh. No. 145, Stipulation No. 103. Plaintiff John Blankenbaker, Sr., knew that Santa Fe was hiring blacks as switchmen in 1968, because his son became one in February 1968; and at the same time he was also offered such a position by Santa Fe. Santa Fe Exh. No. 100-N, at 32. Similarly shown in the deposition testimony by plaintiffs E. Bunch, Smith, Walker, Covington, each of whom was aware that Santa Fe was hiring blacks into the brakemen-switchmen craft. *See* Santa Fe Exh. Noi. [sic] 100-L, at 65; Smith, Nov. 16, 1983

Depo., at 21; Walker, Dec. 8, 1983 Depo., at 86; Santa Fe Exh. No. 100-P, at 21-22. In summary, the Court finds that there is substantial and credible evidence to conclude that Santa Fe began in 1968 to recruit blacks into the brakeman or switchman craft in various districts, and that by 1968 and thereafter such employment opportunities and hirings were generally known to many plaintiffs and class member chair car attendants. However, the Court makes clear that this finding of any pre-existing patterns or practices of discrimination on the basis of race no longer systematically prevailed after 1968 does not mean the Court would assume that there was no single instance of discrimination ever occurring thereafter. For the purpose of determining whether or not an outermost limit on liability should be drawn, the Court believes that plaintiffs cannot assert a class claim for damages upon the theory of disparate treatment beyond the period in which they had equal access to promotion or to transfer to better-paid jobs.

Plaintiffs also claim that the disparate economic impact from the craft seniority system deterred them from accepting jobs in the other crafts. The typical reason given by plaintiffs that they and the class member chair car attendants were generally unwilling to consider transferring to entry-level jobs in other railroad crafts in the post-Act period is that they could not retain their chair car seniority or carry-over their seniority to the new craft. Tuggle, Vol. I, at 115; Zanders, Vol. I, at 137-138, 157, 172; Jackson, Vol. II, at 353; Harvey, Vol. II, at 338; J. Bunch, Santa Fe Exh. No. 100-M, at 48; Lyons, Santa Fe Exh. No. 100-R, at 59, 93; Smith, Santa Fe Exh. No. 100-U, at 14-15; Van Winkle, Santa Fe Exh. # 100-W, at 58; Walker, Santa

Fe Exh. No. 100-X, at 31; *see also* Shoemaker, Vol. II, at 447; Woolfolk, Vol. II, at 499. In some cases, they did not want to hire out in a new craft for an additional reason that they wanted a preserve their Feb. 7 wage protection as chair car attendants, which protection, until the March 23, 1971 Agreement, would have been forfeited along with their seniority with a transfer out of their chair car attendant craft. *See e.g.*, Powell, Vol. I, at 208-209; Harvey, Vol. II, at 389-392.

The use of the craft seniority system has been a standard labor management practice in the railroad industry. Under the craft system, an employee normally would be required to forfeit any previously accumulated seniority credits upon transferring from one craft to another, even under the same employer. *See generally* Gamst, Vol. VII, at 1439-1450. The chair car attendant union, BSCP, sought to modify this seniority forfeiture rule and was successful in obtaining financial protection from Santa Fe in the March 23, 1971 Cross-Craft Agreement. As noted above, this Agreement not only allowed chair car attendants to transfer to any other crafts on Santa Fe, not just limiting to switchmen-brakemen, and to retain their chair car attendant seniority standings, but it also provided that their entitlement right to guaranteed monthly rates under the Feb. 7 Agreement remained intact if they did transfer. Furthermore, if they were unable to obtain work assignments regularly in the new crafts, they could return to their chair car attendant craft by exercising their standing seniority. Whatever undesirable economic effects plaintiffs claim such a craft system might have had in deterring chair car attendants from considering inter-craft transfer or promotion across craft

lines to better jobs, the Cross-Craft Agreement relieved those chair car attendants who chose to hire out in new crafts of any anxiety in having had to "commit seniority suicide." By this Agreement of March 23, 1971, virtually all reasonable economic risks that might have discouraged chair car attendant's long-yearning desire to seek better-paid jobs after 1968 was effectively and securely eliminated. Indeed, chair car attendants had an advantage after March 23, 1971 in competing with applicants from other crafts for the same jobs. Whether the job offers by Santa Fe after 1968 were unconditional or not, the evidence shows without substantial dispute that even after March 23, 1971 many chair car attendants, including some of the plaintiffs here, refused to consider jobs for which they had equal opportunity to apply. These jobs were refused because they claim that they could not carry their chair car seniority credits and "dovetail" them into the new craft rosters. An employee cannot claim back pay beyond the period in which he rejects an employment offer to a position he originally sought, even without an offer of seniority retroactive to the date of discrimination. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 73 L.Ed.2d 721 (1982). In *Sears*, we held that only those chair car attendants demoted from train porters who applied or would have applied for switchmen-brakemen jobs before March 23, 1971 and were willing to give up their Feb. 7 protection and chair car seniority were entitled to back pay and seniority relief. *Sears*, 19 FEP 1007, 1013-1014 (D.C. Kan. 1978). We hold that those chair car attendants who did not apply for the switchman or brakeman positions, or any other better-paid craft positions on Santa Fe, between March 23, 1971 and May 1, 1974 when Amtrak took over

the on-board passenger service are not entitled to any relief, since a failure to apply where there were openings in better-paid craft positions known and accessible to chair car attendants indicates that they were uninterested in diligently seeking these positions.

XII. *VALIDITY OF SENIORITY SYSTEM*

Plaintiffs claim that they and class member chair car attendants were victims of the same discriminatory, non-bona fide seniority system found in *Sears*, under which black train porters and demoted chair car attendants unjustly suffered for several decades. We disagree that the nature and substance of the seniority system for the chair car attendant craft is similar to or comparable with that of the train porter craft, which we struck down for violating the Civil Rights Act. We found in *Sears* that the creation and maintenance of a separate seniority system for an all-black train porter craft was illegal and not immunized from liability under Section 703(h) of the Act, because these train porters (including those who were later demoted to the chair car attendant position by Award 19324) performed substantially similar operating functions as, but received employment benefits and privileges unequal to those brakemen-switchmen who belonged to a predominately white-member union. We believe that the creation and maintenance of a separate seniority system for the chair car attendant craft was based on legitimate business reasons. Any discrimination in the employment of blacks in the chair car attendant craft was in the initial selection and assignment of employees to staff this "non-operating craft."

Under Title VII, the continuation of employment practices or procedures which perpetuates the past effects of racial discrimination is unlawful. *Griggs v. Duke Power Co.*, 401 U.S. 430, 28 L.Ed.2d 158, 163 (1971). But in *Teamsters*, the Supreme Court recognized that Section 703(h) of the Act exempts bona fide seniority system from Title VII liability even if the system operates to perpetuate the disparate effects of past discrimination. 431 U.S. at 352, 52 L.Ed.2d at 426. In *Pullman-Standard v. Swint*, 456 U.S. 273, 276-277, 72 L.Ed.2d 66, 72 (1982), the Court further stated that under Section 703(h) "a showing of disparate impact is insufficient to invalidate a seniority system." A challenge to the lawfulness of a seniority system under Title VII requires that a plaintiff to prove the system was adopted with intent to discriminate. *Id.*, at 277.

The procedures for analyzing whether or not a seniority system is bona fide and thus comes under the protective shelter of section 703(h) are set out in *Firefighters, Inc. v. Bach*, 731 F.2d 664 (10th Cir. 1984). It instructed that a trial court should focus its factual assessments on a seniority system being challenged as illegal on four particular factors.

> "First, a court must determine whether the system 'operates to discourage all employees equally from transferring between seniority units.' . . . Second, a court must examine the rationality of the departmental structure, upon which the seniority system relies, in light of the general industry practice . . . . Third, a court had to consider 'whether the seniority system had its genesis in racial discrimination,' . . . by which it meant the relationship between the system and other racially discriminatory practices. . . .

> Finally, a court must consider 'whether the system was negotiated and has been maintained free from any illegal purpose.' "

Id., at 668.

Before we proceed to examine the validity of the separately created and maintained seniority systems for the crafts of chair car attendants and brakemen-switchmen according to the criteria as listed in *Bach*, the Court will make a brief observation of the partisan experts, Professor Herbert Hill for plaintiffs and Professor Frederick Gamst for defendants, who offered their testimony primarily as labor historians. It is not the diverging conclusions which these academics have reached that particularly concerns the Court. Rather, it is their reasonable and objective interpretations, on the past as well as current history of the labor relations that are valuable to the Court for assessing the merits of the dispute. While each of us may hold a different view in the reading and interpretation of primary historical facts. Professor Hill's dogmatic teaching approach from a racist viewpoint on the seniority and promotion system of the railroad industry is too far adrift from the mainstream of thought which historians of this intellectual discipline have embraced. This is not a say that there were never racial discrimination in the railroad industry employment. Defendants have indeed admitted that they occurred in a time period in which people shared a different social, moral, political and legal point of view on matters which we may find repugnant to the values and beliefs we hold today. However, neither can we accept Professor Hill's indiscriminate assertion that the patterns of racial discrimination covertly remain intact today because the railroad industry

continues to adhere to the practice in endorsing separate seniority provisions for different crafts. Nor do we agree with his vituperative view that the implementation of various programs to achieve employment equality since 1965 is merely a "token" effort by the railroad industry for claiming a basis in showing its compliance with the law.

We now turn to examine the first factor of the four-part analysis for testing the validity of a seniority system. (1) Does the seniority system apply equally to all races, discouraging transfers of all employees, whites as well as blacks, between crafts? In *Sears*, the Circuit Court noted on the basis of the stipulated facts that while porters and chair car attendants were considered to belong to the train crew performing related job functions as brakemen, switchmen and conductors, only the seniority rosters of the brakemen and switchmen were dualized which "allowed *all* members of this operational crew – except porters and chair car attendants – to transfer without a loss of seniority." *Sears, supra*, 645 F.2d at 1373 (emphasis added). The Court thus concluded that the seniority system failed to meet the "equally apply" criteria because those employees who were discouraged by the seniority forfeiture rules from transferring to another craft were blacks. *Id.*

The *Sears* litigation was tried on stipulated facts, the evidence in the *Blankenbaker* litigation, after a plenary trial on all of the issues to the Court, establishes factual matters which were not part of the stipulated facts presented to the Court of appeals for review in *Sears*. The evidence shows that the "dualization " of brakemen-switchmen seniority rosters began on the Santa Fe Coast

Lines in 1959. In the following years, this process in merging these two crafts' seniority rosters occurred in some seniority districts, but was not fully completed and implemented throughout the Santa Fe system. Thus, contrary to the found by the Circuit Court in *Sears, supra*, not all brakemen and switchmen on the Santa Fe system were allowed freely to make inter-craft transfers between these two "similar" crafts without forfeiting their incumbent seniority credits. There were brakemen-switchmen groups, for example, in the Arizona Division and the Chicago Division, whose seniority lists were never dualized. *See* UTU Exh. No. 103; Murphy, Vol. V, at 1079-1080. In the Kansas City Division, switchmen in that Division did not have the right to work in the brakemen craft in the Easter Division before April 1, 1974, except to work as new hires by forfeiting their yard seniority. Murphy, *id.*, at 1073-1079. On the other hand, only those brakemen in the Eastern Division who were hired after April 1, 1971 will hold dual seniority rights on the road and yard rosters. *Id.*, at 1076. Those Eastern Division brakemen with a seniority date prior to April 1, 1971 would have to forfeit their seniority when they transferred to the switchmen craft at the Kansas City Argentine Yard. *Id.*, at 1077. Similarly, switchmen in the Colorado Division-Denver Division did not have the right to work as brakemen in that Division until September 2, 1975, and only then were they to work as a new hire in the brakemen craft in that Division. *See* UTU Exh. No. 11, at 152.

Both the switchmen and brakemen jobs are entry-level positions on Santa Fe. Seymour, Vol. III, at 728; Chesney, Vol. V, at 1116-1117. All employees hired into

the entry-level positions are required to hire out as new employees and to establish a date on the seniority roster based upon their first date of employment. Thus, the Santa Fe seniority forfeiture rules on entry-level jobs have always worked to discourage not only black employees, but also white brakemen or switchmen from moving to another craft for economic or job security reason. Under the dualization agreements, no carry-over seniority was provided. It is credibly demonstrated that no person was ever hired directly or by the dualization agreement into any switchman or brakeman jobs with carry-over seniority from any craft or roster. Hart, Vol. IV, at 888; Murphy, Vol. V, at 1079; Easley, Vol. VI, at 1234; Gamst, Vol. VII, at 1437-1438; *see also* Wallace, Vol. II, at 288-304. While the merger of brakemen and switchmen rosters in some Santa Fe seniority districts ameliorated the traditional deterrence on inter-craft movements between these two crafts, black chair car attendants were no less disfranchised by the seniority forfeiture rules than those white brakemen and switchmen before 1971 on the Eastern and Western Lines. Indeed, chair car attendants obtained their seniority protections and other job security benefits under the March 23, 1971 Agreement, which was intended to instill them with economic incentives to apply for better-paid jobs offered equally to its employees by Santa Fe, before many white brakemen and switchmen on the Eastern Lines were allowed to retain their incumbent seniority credits upon transferring to another craft. Furthermore, even though the substantial number of brakemen and switchmen affected by the dualization agreements were whites, those who transferred to a new craft, like those black chair car attendants who transferred

under the 1971 Cross-Craft Agreement, were required to start at the bottom of the seniority roster. We find that the Santa Fe seniority system for brakemen-switchman was equally applicable to all applicants regardless of race.

(2) Is the separation of bargaining units rational and in accord with general industry practices? In *Sears*, the Circuit Court determined that "the creation of the porter and chair car attendant crafts was not rational because they were drawn along racial lines." *Sears, supra*, 645 F.2d at 1373. There was ample evidence in *Sears* which demonstrated that a train porter performed substantially the same operating functions as a white brakeman and that a train porter was in all material respects, but his job title, a brakeman. Thus, it was concluded that the only reason for maintaining separate seniority for these functionally similar crafts was race. It is unclear, however, the factual basis upon which the Circuit Court relied in declaring that the separate bargaining unit for chair car attendants was irrational. The Circuit Court did acknowledge factually that chair car attendants were non-operating personnel who, unlike the train porters, "performed no braking duties." *Id.*, at 1369.

There is no dispute that the official duties of chair car attendants were separate and distinct from, and involved none of those performed by brakemen and switchmen. Chair car attendants on Santa Fe, like those employed in other passenger rail carriers across the United Statse [sic] and of the industrial nations, had non-operating tasks, which were not safety critical and regulated by the code of operating rules. Rather, chair car attendants on passenger trains performed those tasks essentially similar to those employed in hotel services. There were two broad

categories of tasks for chair car attendants to attend on the "hotels on wheels." One of which was in housekeeping. This generally required that the premises which the guests occupied be kept neat and clean according to the standards for passengers' comfort and convenience required by the carriers. The other was that of a hotel doorman. This involved that chair car attendants stand by the doors of the chair cars to assist passengers to get on and off the trains, and to help them with their baggage.

In those nations of homogeneous race, e.g., Japan and Mexico, chair car attendant craft has always been operated as a separate craft and maintained under a separate seniority system form [sic] those operating employees. Gamst, Vol. VII, at 1468. Before Amtrak took over the on-board service, other non-operating on-board service personnel such as stewards on Santa Fe passenger trains – most of whom were white and represented by UTU – kept a craft seniority separate and distinct from operating personnel. Gamst, *id.*, at 1439. Since May 1974, the duties of Santa Fe chair car attendants have largely remained unchanged for the service attendants on Amtrak, and the maintenance of the chair car job as a separate craft continues today. Fleming, Vol. VI, at 1208-1209. We find there is substantial evidence credibly demonstrated for legitimate business reasons that the craft and seniority distinction preserved between chair car attendants on the one hand and operating employees, such as brakemen and switchmen on the other, was rationally based upon functions and duties of respective crafts and in accord with industry pracrtices [sic], not based upon racial lines.

(3) Did the brakemen-switchmen seniority system have its genesis in racial discrimination? Historical researches have revealed that the origin and development of crafts and seniority systems in railroad industry dates back to the Eighteenth Century in Great Britain. The first operating craft was the "brakesman." The brakesman hand-braked single and multiples of cars that transported ores and minerals from mines and quarries down grades to tidewater where they were barged away. Begining [sic] from 1830, other operating crafts, such as locomotive engineers, firemen, emerged when steam locomotives replaced cars that were drawn by horses. The person who supervised the employees on a train and was in charge of its operation was called the headguard in Great Britain, or the conductor in America. Each of these employees belonged to a craft that was organized on the basis of their specific operating duties to which they performed. This practice of maintaining a system of crafts was adopted by the railroad industry in America before the organized movement in trade-unionism occurred. Gamst, Vol. VII, at 1440-1441.

The development of railroad seniority system can be traced back to the beginning of the railroad industry when it was managed by former military officers, whose traditions and customs were reflected in the manner in which the industry was organized. The principle of rank and precedence that underscored the military structures was recognized by railroad managers in job assignments. However, the vice that grew out of such practices was demonstrated in the complaints that railroad managers often acted arbitrarily and capriciously in using the seniority customs for their personal advantage. In

response to the arbitrary management conduct, some craft organizations were able to obtain more formalized craft seniority systems by the middle and late Nineteenth Century. Gamst, *id.*, at 1442-1445.

The brakemen and switchmen on Santa Fe organized BRT in 1883 to represent them for bargaining with Santa Fe on labor matters until 1969 when it was absorbed by UTU. Their first known labor contract that contained seniority provisions was executed in April 1892 – before the creation of the train porter craft and the chair car attendant craft. We find that the origin in establishing different crafts and seniority system in the railroad industry generally was not motivated by racial animus. Specifically, we believe that the historical evidence has clearly demonstrated that the organization of the brakemen-switchmen craft and its seniority system was a direct countervailing response to protect its members against favoritism and nepotism in personnel management. We conclude that the craft seniority system for brakemen and switchmen that was designed in 1892 was not rooted in the motivated by racial discrimination. *See Sears, supra,* 645 F.2d at 1374 ("the Seniority system for brakemen may have originated without conscious regard to race.")

(4) Was the system negotiated and has it been maintained free of any illegal purpose? In *Sears,* the Circuit Court noted that BRT sought to obtain the front-end braking duties from black train porters by claiming that its collective bargaining agreements entered into during the 1910's required Santa Fe to place only brakemen to perform braking functions. The outcome of this protest before the National Railroad Adjustment Board was the Award 19324 in 1959. It ruled in favor of BRT on the basis

of its seniority agreements, holding that only those train porters with a seniority date prior to April 20, 1942 could continue to perform front-end braking duties. The Circuit Court concluded that the seniority agreements between Santa Fe and BRT were negotiated with the maintained for a discriminatory purpose, because the system "was used as a sword by the union in its efforts to take" braking duties from train porters. *Sears, supra,* at 1374.

Unlike the train porters and the demoted chair car attendants (formerly train porters) in *Sears,* none of the plaintiffs and chair car attendant class members involved in this *Blankenbaker* litigation, based upon believable evidence and testimony, ever performed any braking duties. All of the plaintiffs and the class members whom they represent here were employed on Santa Fe as chair car attendants to perform non-operating functions. Because some of the plaintiffs are claiming that the primary expectation for chair car attendants in the "line of progression" was to become train porters, plaintiffs argue that the effect of Award of 19324 was just as devastating on the plaintiffs and the class members in this litigation as on those displaced train porters in *Sears* who held a seniority date after April 20, 1942. Dkt. No. 134. But this argument ignores that the jurisdictional dispute in Award 19324 involved an assertion on seniority agreements in which BRT claimed that its members had the exclusive contractual rights to braking duties. There is no evidence that the seniority system for brakemen and switchmen was negotiated and maintained for the purpose to banish the employment of black chair car attendants from such craft position on Santa Fe, nor is there any evidence that BRT also made such a demand in its protest for braking

duties before the National Railroad Adjustment Board in 1939.

We conclude that based upon the totality of the evidence presented in the trial of this case the craft seniority system, as it was applied to the chair car attendant craft, was bona fide, and that defendant UTU is shielded from liability for assessment of back pay under Section 703(h), Title VII of the Civil Rights Act. UTU, however, remains in this action under Rule 19(a), F.R.Civ.P., for the determination of appropriate seniority relief. *Teamsters, supra,* 431 U.S. at 356 n. 43.

XIII. *REMEDY*

Because Santa Fe has settled with the plaintiffs and the class members on their claims for back pay and because we have determined that UTU is not liable for any back pay assessment, the only appropriate relief that remains for the Court to decide is on seniority matters. Prior to trial, defendants moved for a redefinition of the class as certified, by dividing it into subclasses on the basis of their employment dates as chair car attendants. The Court denied the motion at that time, but has reserved its ruling on this issue until all of the evidence was heard. On the basis of the facts found and the law concluded, the Court finds that it is appropriate to modify the class certification order by limiting the scope of the class to exclude those who were employed as chair car attendants on Santa Fe after March 23, 1971.

The Court has considered the guidelines established in *Sears* for the subclass chair car attendants on seniority relief. The Court finds that these guidelines are generally

applicable to the members of the *Blankenbaker* chair car attendant class, as redefined heretofore by excluding those who were employed in such employment capacity after March 23, 1971, who applied or would have applied for the brakeman or switchman position but for the discriminatory practices in job assignment by Santa Fe. For the purpose of establishing an appropriate seniority date on either one of the brakeman and switchman rosters, the Court will divide the chair car attendant class into two categories: those who applied for the position of brakeman or switchman and those who did not apply for either one of these positions before March 23, 1971.

The standards of proof for chair car attendants who applied for but were not hired in either the brakeman or switchman position will be as follows. Each plaintiff in this category must show:

(1) the date he applied (but no earlier than July 2, 1965) for a transfer or promotion, and

(2) that he was physically qualified for the job of brakeman or switchman. This may be shown by submitting into evidence that he performed another job for Santa Fe which required similar physical or medical requirements.

In *Sears*, we did not require that chair car attendants who actually applied for a transfer to show that they would have been willing to give up their Feb. 7 protections and their seniority credits as chair car attendants. By applying for brakeman-switchman positions, it was presumed that under the craft seniority systems they were willing to give up whatever employment entitlements which chair

car attendants may have had at the time of their applications. We believe that the same presumption should be given to the chair car attendants here who did apply for a transfer or promotion on Santa Fe.

The standards of proof for those chair car attendants who did not apply but would have applied for position of brakeman or switchman but for the discriminatory practices will be as follows. Each plaintiff in this category must demonstrate:

(1) that he would have applied for the job of brakeman or switchman on Santa Fe, being willing

  (a) to give up the protections of the Feb. 7 Agreement between February 8, 1966 and March 23, 1971,

  (b) to resign his seniority as a chair car attendant prior to March 23, 1971,

  (c) To begin at the bottom of the brakeman or switchman seniority roster,

(2) that the date he would have applied for the job of brakeman or switchman under these conditions, and

(3) that he was physically qualified for the job of brakeman or switchman. This may be shown by submitting into evidence that he performed another job on Santa Fe which required similar physical or medical requirements.

Plaintiffs in either one of these categories who satisfy the elements of proof in each category will be entitled to the presumption that a vacancy for a brakeman or switchman existed at the time of his application, since vacancies in these two crafts regularly occurred and were filled.

However, unlike the demoted chair car attendants in *Sears*, no presumption will be given to the *Blankenbaker* class members that they were able to perform the job functions of a brakeman or switchman, because none of them ever performed any braking or switching duties as a part of their official job duties as chair car attendant. On the basis of having met all of the requirements and presumptions, plaintiffs will be deemed to have shown that they were actual victims of the discriminatory treatment by Santa Fe, and are entitled to appropriate relief that will as nearly as possible "recreate the conditions and relationships that would have been had there been no unlawful discrimination." *Teamsters, supra,* 431 U.S. at 372, 52 L.Ed. 2d at 438. Under the posture of this litigation, this will be accomplished by an award of retroactive seniority from the date each plaintiff would have or did apply for a transfer or promotion. However, no person will be given a retroactive seniority to a date earlier than the effective date of the Civil Rights Act of 1964. *Id.*, at 356-357. Furthermore, retroactive seniority award is available only to those class members who are still actively employed by Santa Fe, since only they would benefit from it.

XIV. *CONCLUSIONS AND ORDER*

We summarize our findings and conclusions as follows. The Court finds and concludes:

(1) that there was discriminatory treatment by Santa Fe in job assignment on the basis of race after the effective date of the Civil Rights Act in violation of 42 U.S.C. Sec. 2000e-2(a) in refusing to transfer or promote class

members. Liability for a violation of the Civil Rights Act terminates on and does not run beyond the date of March 23, 1971;

(2) that craft seniority system for the craft of brakeman-switchman, as it was applied to the chair car attendant craft, was bona fide, and that defendant UTU is immunized from liability for assessment of back pay under Section 703(h), Title VII of the Civil Rights Act. UTU, however, remains in this litigation under Rule 19(a), F.R.Civ.P., for the determinations of appropriate seniority relief;

(3) that the scope of the chair car attendant class, as originally certified by Order of September 6, 1984, should be and is hereby modified to exclude those class members who were employed as chair car attendants on Santa Fe after March 23, 1971;

(4) that Santa Fe has settled with plaintiffs and class members on their claims for back pay, attorneys' fees, and costs, and that UTU has no liability for back pay assessment;

(5) that Santa Fe and UTU have the responsibility to adjust the seniority lists for brakemen-switchmen for those plaintiffs who meet the guidelines on seniority relief as provided heretofore in this Opinion; and

(6) that the issue of assessing appropriate attorneys' fees and costs is reserved for determination at an appropriate time.

IT IS BY THE COURT ORDERED that within twenty (20) days from the date of the Opinion counsel for defendants Santa Fe and UTU will prepare, circulate, and submit a Judgment consistent with the findings and conclusions expressed heretofore in this Opinion. Rule 58, F.R.Civ.P.

At Wichita, Kansas this 9th day of June, 1986.

/s/ Wesley E. Brown
Wesley E. Brown
United States District
Senior Judge

EQUAL EMPLOYMENT OPPORTUNITIES

Pub.L. 88-352, Title VII, July 2, 1964, 78 Stat. 253, as amended

Title 42, U.S.C.A., §§ 2000e to 2000e-17

§ 2000e. Definitions

For the purposes of this subchapter –

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in case under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exits for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A.

§ 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the

preceding sentence shall not include employees subject to the civil service laws of a State governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959. [29 U.S.C.A. § 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(Pub.L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103; Pub.L. 95-555, § 1, Oct. 31, 1978, 92 Stat. 2076; Pub.L. 95-598, Title III, § 330, Nov. 6, 1978, 92 Stat. 2679.)

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

* * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee

subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

* * *

§ 2000e-5. Enforcement provisions

* * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the

person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

* * *

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to

reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(h) Provisions chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

* * *

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

* * *